136-356

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 166.

THE NASHUA AND LOWELL RAILROAD CORPORATION, APPELLANT,

vs.

THE BOSTON AND LOWELL RAILROAD CORPORATION, CHARLES E. A. BARTLETT, AND GEORGE F. RICHARDSON; REBECCA T. HOSFORD AND ARTHUR G. POLLARD, EXECUTORS OF HOCUM HOSFORD, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 12, 1886.

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INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint (omitted in printing)	3	—
Amendment of bill (omitted in printing)	22	—
Defendants' plea (omitted in printing)	23	—
Motion that defendants be ordered to answer over (omitted in printing)	25	—
Demurrer of B. & L. R. R. Corporation (omitted in printing)	25	—
Demurrer of Charles E. A. Bartlett (omitted in printing)	28	—
Motion to strike out demurrer, &c. (omitted in printing)	31	—
Bill of revivor (omitted in printing)	31	—
Motion to amend bill (omitted in printing)	36	—
Amended bill of complaint (parts omitted in printing)	37	—
Agreement as to Exhibit A	48	9
Exhibit A—Contract between The Boston & Lowell and Nashua & Lowell R. R. Corporations, Feb. 1, 1857	48	9
Answer of Hocum Hosford's executors	57	15
Exhibit No. 1 (not set out)	61	—
No. 2 (not set out)	61	—
Demurrer of The Boston & Lowell R. R. Corporation (omitted in printing)	61	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 12, 1889.

	Original.	Print.
Demurrer of Charles E. A. Bartlett (omitted in printing)	63	—
Motion to strike out demurrers (omitted in printing)	65	—
Replication	66	18
Answer of Charles E. A. Bartlett (omitted in printing)	67	19
Answer of The Boston & Lowell R. R. Corporation (parts omitted in printing)	72	19
Exhibits A, B, C, and D (memorandum as to these exhibits omitted in printing)	73*k*	27
Exhibit E—Submission to arbitrators, September 30, 1882, by Nashua and Lowell, and Boston and Lowell Railroad Corporations	73*l*	28
Exhibit 1, annexed thereto, claims of N. & L. R. Co	73*m*	29
Claims of B. & L. R. Co	73*n*	29
F—Award of arbitrators	73*s*	33
Papers annexed thereto, Exhibit A, petition of N. & L. R. Co	73*x*	37
Exhibits B, C, and D—Revocation of submission by N. & L. R. Co	74*a*	40
Exhibit E—List of claims settled	74*g*	43
F—Notice to N. & L. R. Co	74*i*	44
Replication	74*j*	45
Additional answer of Boston & Lowell R. R. Corporation	74*k*	45
Replication	74*m*	47
Motion to amend bill	74*n*	47
Disclaimer, &c., as to value of 300 tons rails	74*n*	48
Final decree	74*o*	48
Appeal and allowance of same	74*o*	48
Evidence for complainants	74*p*	49
Documents offered	74*p*	49
Exhibit 1—Supplemental contract of October 1, 1858, between B. & L. R. Co. and N. & L. R. Co	75	49
2—Acts of New Hampshire Legislature of 1835 and 1838 relating to N. & L. R. Co. (omitted in printing)	77	51
3—By-laws of N. & L. R. Co. (parts omitted in printing)	77	51
4—Record of meeting of directors of N. & L. R. Co. July 23, 1872	81	53
5—Annual report of B. & L. R. Co. for 1874 (omitted in printing)	82	53
Deposition of George Stark	83	54
Exhibit 6—Letter from Abbott to Stark, July 22	86	57
Documents offered	91	61
Exhibit 7—Extract from record of N. & L. R. Co. directors' meeting, June 9, 1876	92	61
8—Record of N. & L. R. Co. directors' meeting, June 25, 1877	92	61
9—Extract from record of N. & L. R. Co. directors' meeting, August 25, 1877	94	63
10—Extract from record of N. & L. R. Co. directors' meeting, September 25, 1877	95	64
11—Extract from record of N. & L. R. Co. directors' meeting, October 20, 1877	96	64
12—Vote of directors of N. & L. R. Co., October 9, 1877	97	65
Deposition of Charles E. Cram	97	65

	Original.	Print.
Documents offered	101	68
Exhibit 13—Extract from record of N. & L. R. Co. directors' meeting, May 28, 1872	101	68
14—Rules of B. & L. R. Co. and N. & L. R. Co. for government of the executive service	102	69
Deposition of Charles E. A. Bartlett	105	71
William W. Bailey	110	75
Exhibit 15—Interest on investments charged to B., L. & N. R. by B. & L. R	111	76
Deposition of William W. Bailey (continued)	112	76
Evidence for defendants	114	78
Deposition of Josiah G. Abbott	114	78
Daniel S. Richardson	145	101
George Stark	165	117
Charles L. Tilton	223	162
William W. Bailey	224	163
Walter A. Lovering	249	183
Charles B. Brooks (omitted in printing)	256	—
Documents offered	277	188
Deposition of William W. Bailey (recalled)	279	190
Charles E. A. Bartlett (parts omitted in printing)	279	190
Charles S. Mellen	331	230
William S. Gardner	341	237
William H. Coolidge	344	240
Henry A. Church	345	240
Josiah G. Abbott (recalled)	348	243
Statutes of New Hampshire (extracts)	356	249
Massachusetts (extracts)	356	249
Record of board of directors, &c. (extracts)	360	252
Further evidence for complainants	375	265
Deposition of William W. Bailey	375	265
Charles E. A. Bartlett	376	266
Exhibit Transcript of Record, No. 1—Transcript from records of plaintiff corporation (omitted in printing)	383	—
2—Record of Massachusetts superior court in case of Boston & Lowell Railroad Corporation v. Nashua & Lowell Railroad Corporation	394	271
Exhibit Draft of Contract—Boston and Lowell Railroad Corporation and Nashua and Lowell Railroad Corporation, 1875	417	288
Exhibit Lovering, Forty-third Annual Report of Nashua and Lowell Railroad Corporation's directors	420	290
Defendants' exhibits	424	293
Exhibit 1—Copy of votes passed by directors of N. & L. R. Co. September 28, 1867, and November 23, 1869, (put in evidence, page 172)	424	293
2—Notice to complainants to produce records of N. & L. R. Co. (put in evidence, page 172)	426	294
3—Record of N. & L. R. Co. directors' meeting, January 25, 1859 (put in evidence, page 174)	427	295

	Original.	Print.
Exhibit 4—Same, meeting of April 26, 1859 (put in evidence, pages 174 to 179)	428	296
5—Same, meeting of October 25, 1859 (put in evidence, pages 174 to 179)	428	296
6—Same, meeting of October 23, 1860 (put in evidence, pages 174 to 179)	429	296
7—Same, meeting of December 24, 1860 (put in evidence, pages 174 to 179)	430	298
8—Same, meeting of November 26, 1661 (put in evidence, pages 174 to 179)	432	299
9—Same, meeting of March 25, 1862 (put in evidence, pages 174 to 179)	432	299
10—Same, meeting of August 25, 1863 (put in evidence, pages 174 to 179)	433	300
11—Same, meeting of August 23, 1864 (put in evidence, pages 174 to 179)	434	301
12—Same, meeting of December 27, 1864 (put in evidence, pages 174 to 179)	435	301
13—Same, meeting of February 27, 1865 (put in evidence, pages 174 to 179)	436	302
14—Same, meeting of December 26, 1866 (put in evidence, pages 174 to 179)	437	303
15—Same, meeting of September 22, 1858 (put in evidence, pages 174 to 179)	437	303
16—Same, meeting of September 28, 1869 (put in evidence, pages 174 to 179)	438	304
17—Same, meeting of November 23, 1869 (put in evidence, pages 174 to 179)	439	304
18—Same, meeting of December 28, 1869 (put in evidence, pages 174 to 179)	439	305
19—Same, meeting of October 25, 1870 (put in evidence, pages 174 to 179)	440	305
20—Same, meeting of December 27, 1870 (put in evidence, pages 174 to 179)	440	306
Same, meeting of January 24, 1871 (put in evidence, pages 174 to 179)	441	306
21—Same, meeting of February 6, 1871 (put in evidence, pages 174 to 179)	443	307
22—Same, meeting of February 20, 1871 (put in evidence, pages 174 to 179)	443	307
23—Same, meeting of September 26, 1871 (put in evidence, pages 174 to 179)	445	309
Same, meeting of May 28, 1872 (put in evidence, pages 174 to 179)	446	310
Same, meeting of July 23, 1872 (put in evidence, pages 174 to 179)	447	311
Same, meeting of October 22, 1872 (put in evidence, pages 174 to 179)	448	312
24—Extracts from thirty-seventh annual report (1872) of N. & L. R. Co. directors	449	312
25—Extracts from thirty-eighth annual report (1873) of same	453	316

	Original.	Print.
Exhibit 26—Extracts from thirty-ninth annual report (1874) of same	459	321
27—Extracts from fortieth annual report (1875) of same	467	327
(Exhibits 24 to 27 put in evidence, page 223.)		
28—Notice to complainants to produce books of account, etc., of N. & L. R. (put in evidence, page 224)	472	331
29—Subpœna to W. W. Bailey (put in evidence, page 226) (omitted in printing)	473	—
30—Record of N. & L. Co. directors' meeting, November 26, 1867 (put in evidence, pages 228 to 232)	474	332
31—Same, meeting of September 22, 1868 (put in evidence, pages 228 to 232)	476	333
32—Same, meeting of September 28, 1869 (put in evidence, pages 228 to 232)	476	333
33—Same, meeting of November 23, 1869 (put in evidence, pages 228 to 232)	476	334
34—Same, meeting of November 27, 1869 (put in evidence, pages 228 to 232)	477	334
35—Same, meeting of December 28, 1869 (put in evidence, pages 228 to 232)	478	335
36—Same, meeting of January 25, 1870 (put in evidence, pages 228 to 232)	478	335
37—Same, meeting of May 24, 1870 (put in evidence, pages 228 to 232)	479	335
38—Same, meeting of July 26, 1870 (put in evidence, pages 228 to 232)	479	336
39—Same, meeting of October 25, 1870 (put in evidence, pages 228 to 232)	480	337
40—Same, meeting of December 27, 1870 (put in evidence, pages 228 to 232)	480	337
41—Same, meeting of January 24, 1871 (put in evidence, pages 228 to 232)	480	337
42—Same, meeting of February 6, 1871 (put in evidence, pages 228 to 232)	481	337
43—Same, meeting of February 20, 1871 (put in evidence, pages 228 to 232)	481	337
44—Same, meeting of September 26, 1871 (put in evidence, pages 228 to 232)	481	338
45—Same, meeting of November 28, 1871 (put in evidence, pages 228 to 232)	481	338
46—Same, meeting of December 26, 1871 (put in evidence, pages 228 to 232)	482	338
47—Same, meeting of January 23, 1872 (put in evidence, pages 228 to 232)	483	339
48—Same, meeting of May 28, 1872 (put in evidence, pages 228 to 232)	483	339
49—Same, meeting of July 23, 1872 (put in evidence, pages 228 to 232)	484	340
50—Same, meeting of October 22, 1872 (put in evidence, pages 228 to 232)	484	340
51—Same, meeting of November 26, 1872 (put in evidence, pages 228 to 232)	484	340

	Original.	Print.
Exhibit 52—Same, meeting of September 16, 1873 (put in evidence, pages 228 to 232)	485	341
53—Same, meeting of November 25, 1873 (put in evidence, pages 228 to 232)	486	341
54—Same, meeting of July 28, 1874 (put in evidence, pages 228 to 232)	486	342
55—Same, meeting of September 29, 1874 (put in evidence, pages 228 to 232)	487	342
56—Same, meeting of November 24, 1874 (put in evidence, pages 228 to 332)	487	343
57—Same, meeting of March 23, 1875 (put in evidence, pages 228 to 232)	488	343
58—Same, meeting of July 27, 1875 (put in evidence, pages 228 to 232)	490	345
59—Act of Legislature of Massachusetts to establish N. & L. R. Co. (put in evidence, page 277) (omitted in printing)	491	—
60—Act of Legislature of Massachusetts to unite N. & L. R. Corporations of Massachusetts and New Hampshire (put in evidence, page 277) (omitted in printing)	491	—
61—Form of monthly statement of joint income and expenses (put in evidence, page 235)	492	346
62—Statement of dates of meetings of N. & L. R. Co. directors from 1858 to 1878, inclusive (put in evidence, page 235)	493	348
63—Subpœna to Charles B. Brooks (put in evidence, page 259) (omitted in printing)	497	—
64—Notice to complainants to produce books of account, etc., of N. & L. R. Co., before examiner at Nashua, N. H. (put in evidence, page 278) (omitted in printing)	499	—
65, 66, 67, 68, and 69—Extracts from records of stockholders of N. & L. R. Co. (put in evidence, page 278) (part omitted in printing)	500	350
70—Paper marked "XX." See Record, page 177 (put in evidence, page 278)	532	356
71—Paper marked "XXX." See Record, page 233 (put in evidence, page 278)	532	356
72—Subpœna to Charles B. Brooks (put in evidence, page 270) (omitted in printing)	533	—
73—Subpœna to Walter A. Lovering (put in evidence, page 273) (omitted in printing)	535	—
74—Subpœna to Cornelius V. Dearborn (put in evidence, page 274) (omitted in printing)	537	—
75—Agreement between N. & L. R. Co. and B. & L. R. Co. to submit to arbitration, etc. (put in evidence, page 302)	539	357
76—Award of arbitrators (put in evidence, page 302)	539	357
77—Statement of items withdrawn and settled (put in evidence, page 303)	539	357
78—Contract, September 26, 1867, Conn. & Pass. R. Rd. and B. & L. and N. & L. Rds. (put in evidence, page 331)	541	358

	Original.	Print.
Exhibit 79—Contract, February 24, 1870, Vt. Cent., Northern, Concord and N. & L. and B. & L. Rds. (put in evidence, page 331)	544	361
80—Copy of contract, February 24, 1870, Vt. & Can. Rd. Co. and trustees and managers Vt. Cent. and Vt. and Can. Rds. Cos., the Northern, the Concord, and the N. & L. and B. & L. Rd. Cos. (put in evidence, page 331)	550	367
81—Copy of contract, February 24, 1870, Ogdensburg & L. C. Rd. Co. and Ver. & Can. Rd., and trustees and managers of Vt. Cent. Rd. Co. (put in evidence, page 331)	556	372
82—Articles of agreement, February 24, 1871, between Northern Transportation Co. and other parties (put in evidence, page 331)	563	379
83—Copy of contract, February 24, 1870, Vt. & Can. Rd. Co. and trustees and managers Vt. Cent. and Vt. & Can. Rd. Cos., the Northern, the Concord, and the N. & L. and B. & L. Rd. Cos. (put in evidence, page 347)	570	385
84—Articles of agreement, February 24, 1871, between Northern Transportation Co. and other parties (put in evidence, page 347)	572	386
85—Lease, Salem and Lowell Rd. Co. to Boston and Lowell Rd. Co., dated October 1, 1858 (put in evidence, page 358)	573	387
86—Lease, Lowell and Lawrence Rd. Co. to Boston and Lowell Rd. Co., dated October 1, 1858 (put in evidence, page 358)	573	387
88—Statement of passenger earnings, furnished by C. S. Mellen in answer to Int. 6, page 333	575	389
87—Marked also "Defendants' Exhibit Semi-annual Statements," being the papers read by C. E. A. Bartlett, in answer to Int. 38, page 297 of this Record	576	390
Opinion of the court on demurrers	590	404
merits	593	405
Clerk's certificate	603	411
Bond	604	412
Stipulation in regard to printing record	605	413

1–36 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss*:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable Le Baron B. Colt, circuit judge.

NASHUA AND LOWELL RAILROAD CORPORATION, a Corporation Duly Established and Existing by the Laws of the State of New Hampshire and a Citizen of the State of New Hampshire, Complainants,

v.

BOSTON AND LOWELL RAILROAD CORPORATION, a Corporation Duly Established by the Laws of the State of Massachusetts and a citizen of the State of Massachusetts, and George F. Richardson, Rebecca T. Hosford, and Arthur G. Pollard, Executors under the Will of Hocum Hosford, Late of Lowell, in said District, Deceased, and Charles E. A. Bartlett, of said Lowell, also citizens of the State of Massachusetts, Defendants.

* * * * * * *

37 *Amended Bill of Complaint.* (*Amended by Leave of Court Sept.* 15, 1883.)

To the honorable the judges of the circuit court of the United States for the district of Massachusetts:

Your orator, The Nashua and Lowell Railroad Corporation, a corporation duly established and existing by the laws of the State of New Hampshire and a citizen of said State of New Hampshire, brings this its bill of complaint against the Boston and Lowell Railroad Corporation, a corporation duly established by the laws of the State of Massachusetts and a citizen of said State of Massachusetts, and against Hocum Hosford and Charles E. A. Bartlett, of the city Lowell, also citizens of said State of Massachusetts.

And thereupon your orator complains and says that said Nashua and Lowell Railroad Corporation is and for many years has been a corporation under the laws of the State of New Hampshire, owning a railroad extending from Nashua, in New Hampshire, to Lowell, Mass., and said Boston and Lowell Railroad Corporation is and for many years has been a corporation under the laws of said State of Massachusetts, owning a railroad extending from said Lowell to the city of Boston, Mass.

38 And your orator shows that in the year 1858 said Nashua and Lowell and Boston and Lowell Railroad Corporations entered into a contract in writing with each other, by which it was agreed that the possession, control, and management of these two railroads and the business traffic thereof should be turned over or committed to a single person, to be selected by a vote of each of

the two boards of directors of said corporations, as an agent or manager of both said railroads for the term of twenty years, unless or until he should be displaced as such agent either by a majority of votes of both of said boards of directors or by a unanimous vote of either of said boards of directors; and your orator shows that the intent of said arrangement was to combine or associate together the said corporations as copartners with each other in respect to both the earnings and expensees of traffic of both of them and the control and management of the two roads for twenty years from Oct. 1, 1858, it being provided by said contract that the Nashua and Lowell Railroad Corporation should share in the earnings and expenses of both roads to the extent of thirty-one per cent. of the whole, and that the Boston and Lowell Railroad Corporation should share therein to the extent of sixty-nine per cent. of the whole, a copy of which contract your orator will produce in court and read in evidence at the hearing of this cause.

And your orator shows that said contract for pooling the receipts and operating expenses of the two corporations for the term of twenty years from and after Oct. 1, 1858, was in its terms and provisions outside of and beyond the authority of the directors of said two corporations to enter into, and it received the approval and ratification of the shareholders of the respective corporations at a meeting duly held for that purpose, and its execution was entered upon and continued for said period of twenty years, except as hereinafter set forth.

And your orator shows that by reason of such contract and of the proceedings had thereunder said corporations in fact became copartners as to the receipts and earnings of the railroads of the two contracting parties, and as to the receipts and expenses of such other railroads as were hired or operated by them on the joint account of both, and that as such copartner the Nashua and Lowell Railroad Corporation became entitled to thirty-one per cent. of the net
39 earnings or income of said railroads, to be operated jointly for said term of twenty years, as its share of the entire net income of both corporations, and became entitled to receive its said share or proportion of said net income on the first days of April and October of each year, pursuant to the terms of art. 14 of said contract, meaning thereby thirty-one per cent. of the net income of the Boston and Lowell, the Nashua and Lowell, and the Wilton railroad after the rental charges and expenses of operating all the other railroads hired and operated by either of said contracting parties on joint account should have been first provided for from the total receipts or income of all such roads.

And your orator shows that it was not provided by said contract for pooling the receipts and expenses of the two corporations and for operating the two roads together that either corporation should bear any outlay or expense incurred by the other in improving, enlarging, or increasing its own property or estate, or in rendering the same more costly or valuable than it was at the inception of said contract, except so far as such outlay might be required by way of repairs or rental; and your orator shows that at the making of said

contract the passenger station occupied by the Boston and Lowell Railroad Corporation in Boston was on Minot street, and that the said Boston and Lowell Railroad Corporation became bound to provide and pay for a new station, to be located on Causeway street, without cost or charge to said Nashua and Lowell Railroad Corporation for any outlay made by it in erecting such new station; but it was provided by said contract that (art. 8) " the road-bed, bridges, superstructure, depots, buildings, and fixtures of each road shall be kept as near as they may be in like relative repair from their present state and condition." It was, however, agreed by and between said parties that the track of said Nashua and Lowell Railroad Corporation at the inception of said contract was in better relative condition than that of the Boston and Lowell Railroad Corporation, to the extent or excess in value of three hundred tons of new rails over three hundred tons of old rails, and that this excess of value was to be made good or allowed and accounted for by the Boston and Lowell Railroad Corporation to the Nashua and Lowell Railroad Corporation at the termination of the contract.

40 And your orator shows that George Stark became the joint agent or manager of both railroads under said contract, and so continued until April, 1875, and he was succeeded by the defendant, Hocum Hosford, as such joint agent; and that the defendant, Charles E. A. Bartlett, was in 187– made a sub-agent or cashier and custodian of the joint funds of the two roads under said joint management, and so remained at the expiration of said contract, in 1878, and that during the same period the said Bartlett was and he now is also the treasurer of said Boston and Lowell Railroad Corporation.

And your orator shows that in the year 1871 the Boston and Lowell Railroad Corporation proceeded to buy and did buy, for its own separate use and benefit, a majority of the shares or capital stock in the Lowell and Lawrence and Salem and Lowell Railroad Corporations at a large cost, viz., at a cost in all of $345,674, the said railroads being then under lease to said Boston and Lowell Railroad Corporation and being operated for the joint account of both the Boston and Lowell and Nashua and Lowell Railroad Corporations at a rental shared between them in the ratio of thirty-one per cent. and sixty-nine per cent., as aforesaid.

And your orator shows that no modification of the terms of said joint traffic or partnership contract, as concluded for twenty years from Oct. 1, 1858, was ever made with the consent of the orator, except so far as related to the hiring or operating on joint account of said Salem and Lowell and Lowell and Lawrence railroads, of the Stoneham Branch, the Lexington and Arlington, the Middlesex Central, and the Peterboro' railroads, and the hiring of Phillips's wharf in Salem, and the acquisition in Boston of the Mystic wharf property for the purposes of said partnership, as aforesaid.

And your orator shows that during the year 1872, and ever after that year until the termination of said traffic contract by its own limitation, all the receipts or income of the two combined railroads under the control of the joint agent went into the possession of the

treasurer of the Boston and Lowell Railroad Corporation, and that it was his duty, after first paying all the expenses of operating said combined railroads, to pay over to the treasurer of the Nashua and Lowell Railroad Corporation thirty-one per cent. of the residue as its share of the joint earnings under said contract; but your
41 orator shows that ever since the first day of July, 1872, a portion of said thirty-one per cent. of said net income or earnings has been withheld from the Nashua and Lowell Railroad Corporation and retained by or paid over to the treasurer for the time being of the Boston and Lowell Railroad Corporation, and has been taken and appropriated by said last-named corporation to its own use, contrary to the meaning and provisions of said joint-traffic contract, and that said last-named corporation has consequently become accountable to your orator for the portions of its share of said net income so withheld from it and appropriated by the Boston and Lowell Railroad Corporation, contrary to the provisions of said joint-traffic contract in this behalf, and has become liable also for the interest of the sums so taken and appropriated by said last-named corporation, or its treasurer, in excess of the proper share of said net income to which the said Boston and Lowell Railroad Corporation was entitled, viz., sixty-nine per cent. thereof.

And your orator shows that the sums so taken from the share of said net earnings apportioned by the contract to the Nashua and Lowell Railroad Company by the Boston and Lowell Railroad Company and applied to its own use by said last-named company in excess of its own proper share, or sixty-nine per cent. of said net earnings, were as follows, viz:

During the financial year ending Sept. 30,			1872	$7,544 00
"	"	"	1873	21,250 00
"	"	"	1874	27,776 00
"	"	"	1875	31,239 00
"	"	"	1876	31,227 00
"	"	"	1877	31,463 00
"	"	"	1878	31,463 00
The said sums amounting in all to				$181,962 00

and being equal to thirty-one per cent. of the interest (reckoned at seven per cent. per annum) upon the entire outlay of the Boston and Lowell Railroad Corporation in the erection of its new passenger station in Boston and its new station at Winchester and in building the Mystic River railroad leading to Mystic wharf.

42 And your orator also shows there was also taken by the Boston and Lowell Railroad Corporation from your orator's share of said net earnings, and in excess of sixty-nine per cent. of said net earnings belonging to the defendant corporation, the following sums at the times following, viz:

Down to Sept. 30, 1873		$5,660 00
During the year ending Sept. 30,	1874	4,699 00
" "	1875	4,699 00
" "	1876	3,520 00
" "	1877	3,773 00
" "	1878	3,773 00
Amounting in all to		$26,124 00

and being equal in amount to thirty-one per cent. of the interest (reckoned at seven per cent. yearly) upon the cost ($345,674) of shares owned by the Boston and Lowell Railroad Corporation in the Salem and Lowell and Lowell and Lawrence railroads, after deducting therefrom the amount of dividends on said shares received by said corporation defendant.

And your orator shows that the sums so taken by the defendant corporation beyond its proper share of the net earnings under said contract and diverted from the treasury of your orator, where they belonged, as a part of its thirty-one per cent. of said net earnings, amounted, without interest, to the sum of $208,086 in all.

And your orator shows it is sometimes pretended by the defendant corporation or its officers that the interest deductions made from your orator's share of said net earning were so made under the authority of a certain vote of the directors of both corporations passed July 23, 1872, the intent of which vote was to provide that said interest items should constitute a part of the expenses of operating said railways under said contract.

But your orator shows that the only vote on this subject is a vote in the words following, viz:

"Voted, That the expenditures made and to be made by the Boston and Lowell Railroad Company for land and buildings in Boston for a new station, and the expenditures made and to be made
43 by said corporation for the building and completing the Mystic River railroad and for the improvements in Winchester for a new station and land for railway purposes to the amount of $20,000 are to be treated in the management of the business under the joint business contract existing between said corporation and the Nashua and Lowell Railroad Company as follows, viz: The said Boston and Lowell Railroad Company are to be paid the interest upon such expenditures, made and to be made, at the rate of seven per cent. per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract; and the cashier of said two corporations and treasurer of the Boston and Lowell Railroad Company is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston and Lowell Railroad Company out of the joint receipts of said two corporations;" and that said vote was not passed at a meeting of the directors of either the plaintiff or the defendant corporation acting separately and distinctly for the transaction of the business of either

corporation, and participated in by a single board of directors only, as by law required, but it was passed, if passed at all, at a meeting composed of members of both boards of directors coming together as if members of the same or a single board of directors, and sitting together under one presiding officer, and entertaining business matters and voting thereon as one body or in common, or jointly at one and the same time, without division or discrimination, or separate action with reference to any difference in the bearing or effect of such vote upon the interests of the two corporations.

And your orator shows that by reason of this state of things it came to pass at the meeting held on the twenty-third day of July, 1872, that a vote wholly favorable to the interest of the defendant corporation and wholly adverse to the interest of the plaintiff corporation was passed by votes cast by the directors of the defendant corporation or by persons not being directors in the plaintiff corporation at all, and that the vote in question, passed July 23, 1872, was brought before the meeting or moved by J. G. Abbott, a
44 director in the defendant corporation and not a director in the plaintiff corporation.

And your orator shows that said vote, passed as aforesaid by two boards of directors of different corporations amalgamating together to form one board, and in that way acting jointly or as one body upon matters affecting in different and opposite directions the separate interests of each corporation, was and is wholly void and without binding force as against the members or shareholders of either corporation not assenting thereto after due notice of the irregularity of such methods of proceeding.

And your orator shows that the pretended vote passed July 23, 1872, did not become known to the stockholders of the Nashua and Lowell Railroad Corporation or to any of them, not being directors in either of said two corporations, until since May, 1877, when a change took place in the board of directors of the plaintiff corporation, which led to the discovery of the pretended vote of July 23, 1872, and to the further discovery of the various sums of which the shareholders of the plaintiff corporation had been deprived under the pretext that the defendant corporation was entitled to be paid interest upon the cost of its own real estate and fixed property as and for the expense of operating the railroad furnished by it under the contract.

And your orator shows, as soon as it became known to the directors elected in May, 1877, that it had been attempted by the amalgamation vote of July 23, 1872, to bestow large sums of money accruing to the Nashua and Lowell Railroad Corporation under the contract as its share of the joint net earnings upon the Boston and Lowell Railroad Corporation under the fiction set forth in said pretended vote, reciting that the interest on the cost of the new Boston station should be treated as one of the items or elements of the expense of operating the Boston and Lowell railroad under the joint contract or declaring it to be so contrary to the fact that said newly elected directors of plaintiff corporation, at a meeting held on the twenty-fifth day of June, 1877, passed a vote in the words following, viz:

"Voted, That whereas the vote of directors passed July 23, 1872, providing that the Boston and Lowell Railroad Company
45 should receive from the Nashua Company interest at seven per cent. upon thirty-one per cent. of the cost or value of additions made by the former company to its property or construction account, is deemed by us to be in plain violation of both the terms and the spirit of the joint-traffic contract itself, said vote of July 23, 1872, is hereby rescinded, not intending hereby to admit that it was ever competent for the directors, by passing said vote, to modify the provisions of said joint-traffic contract relating to division of expense, or that said vote ever had any legal operation whatever in depriving the Nashua and Lowell Company of the benefit of the provisions of said contract relating to the division of the joint earnings under the same," and gave notice thereof to the directors of defendant corporation; but said defendant corporation and its directors wholly disregarded the vote so notified to them, and have ever since disregarded the same, and have ever since, till October, 1878, persisted in withholding from your orator its full share of said net earnings and in retaining and appropriating to themselves much more than sixty-nine per cent. of said net earnings until the misapplication by said defendant corporation had accumulated as hereinabove set forth.

And your orator shows that all the receipts or earnings of said two railroads combined together under said pooling or joint-traffic contract have, ever since the appointment, in 1875, of the defendant Hosford as joint agent or manager, come into the hands or possession of said Hosford, to be dealt with according to the terms or provisions of said contract, so that the plaintiff corporation should receive thirty-one per cent. of all net earnings and the defendant sixty-nine per cent. thereof; and it was the duty of said Hosford as such joint agent to see to it that each party to said contract received its proper share of such net earning; yet the said Hosford, in violation of his trust or duty in this respect, has paid over to the defendant corporation in excess of its share of said net earnings large sums of money, making part of the share of the plaintiff corporation in said net earnings, the details of which payments are hereinbefore shown; and your orator prays that said Hosford may be held personally accountable to your orator in this suit for the amount of all sums so diverted from its share of said net earnings by him or his authority.

* * * * * * *

46 In consideration whereof, and inasmuch as your orator cannot have adequate relief, save in a court of equity, to the end that the defendant corporation may, by its president, J. G. Abbott, answer the several matters and things herein set forth as fully and particularly as if the same were again repeated and he was thereunto specially interrogated, and that he may make such answer, the orator hereby waiving an answer upon oath, and that the said defendant corporation, by its president, may disclose whether the alleged vote of July 23, 1872, above mentioned, was presented for the action of the meeting of said date by himself or on his motion, and, if not,

how otherwise, and whether he was a director of the plaintiff corporation at the said time, or at any time, and in what capacity he was present at said meeting, and whether said meeting was not composed of the directors of both the plaintiff and defendant corporations, sitting together and acting together jointly and not separately, and whether said vote was not put at one and the same time before said meeting for passage as if to one board of directors and not separately to two boards, and whether it was not offered and acted upon at said meeting after the meeting had been adjourned to Young's Hotel, in Boston, for the purpose of taking refreshments, and, if so, how many and who of the directors of each corporation were present at said adjourned meeting at Young's Hotel, and whether said vote was taken before or after refreshments were partaken of, and whether in taking said vote any division was had by which it was made to appear how many of the directors of the Nashua
47 and Lowell Railroad Company took part in said vote, and what part was taken by them, if any; also whether said vote of July 23, 1872, was drawn up or framed by him, and, if not, by whom it was so drawn up or framed; also who presided over said meeting after the adjournment to Young's Hotel, and at the time of the taking of said vote, and whether or not, at the time of taking of said vote, as many as three of the directors of the plaintiff corporation were present and voted thereon in the affirmative, and, if so, who such directors were.

And your orator prays that an account may be taken by order of this honorable court of the amount of its share of the net income apportioned to it under said traffic contract, which has been withheld from it and taken and applied by the defendant corporation to its own use, as hereinabove set forth, amounting in all, as your orator is informed and believes, to $208,086, the details of which sum are hereinabove particularly set forth, and that the defendant corporation may be required by order of this honorable court to restore said sums to your orator, with interest thereon from the time the same were so taken and appropriated by the defendant corporation.

* * * * * * *

And your orator prays that it may have such other and further relief in the premises as may be just and according to equity; and may it please your honors to grant unto your orator a writ of subpœna directed to the said Boston and Lowell Railroad Corporation and the said Hocum Hosford and Charles E. A. Bartlett, commanding them to appear before this honorable court, and full, direct, and perfect answer make to all and singular the premises, and to stand to, abide, and perform such order or decree as your honors may make in the premises.

NASHUA AND LOWELL RAILROAD CORPORATION,
By its president, F. A. BROOKS.

F. A. BROOKS,
Counsel for Complainant.

48 *Agreement.* (*Filed Nov.* 6, 1883.)

And now comes the plaintiff and files as part of the amended bill the copy of the contract referred to in said bill, and the said copy is hereto annexed, marked "A;" and it is agreed that the said copy is a correct copy of a contract made by the plaintiff and the defendant corporation, and that the same may be used in this suit for all purposes for which the original contract might be used if duly produced and proved; and it is agreed that said contract A may be taken as a part of said bill of complaint in the same manner as if the same had been originally filed with said bill and made a part thereof.

F. A. BROOKS,
Solicitor for Plaintiff.
S. A. B. ABBOTT,
Solicitor for Boston and Lowell R. R. Co.

A.

Contract between the Boston and Lowell and Nashua and Lowell Railroad Corporations, February 1st, 1857.

This indenture, made this twenty-ninth day of January, A. D. 1857, between the Boston & Lowell Railroad Corporation, a corporation duly established by the laws of the State of Massachusetts, of the first part, and the Nashua & Lowell Railroad Corporation, a corporation duly established by the laws of the States of Massachusetts and New Hampshire, of the second part, witnesseth:

That whereas a large portion of the business of the roads of the parties hereto is a joint business, passing over the roads and through the hands of both parties, making desirable a common policy and unanimity of management; and whereas in the transaction of said business there is a mutual interest in said parties, both as to the mode of transaction and as to the tariff upon the same, as well as in all other matters relating thereto; and whereas said corporations, by operating said roads in common management, would thereby be enabled to do the said business with greater fa-
49 cility, greater regularity, and at a great saving of expense to both parties: Now, therefore, for the promotion of their mutual interest, through a more efficient and economical joint operation and management of the said roads, and for the better security of their respective investments, as well as for the convenience and interest of the public, the said parties do hereby covenant and agree to and with each other that for the term of three years from and after the first day of February, A. D. 1857, the Boston & Lowell railroad and the Nashua & Lowell railroad, with their respective branches, shall be worked and managed as one road under the stipulations and conditions and subject to the exceptions and limitations set forth in the following articles:

Article I.

Each party shall surrender to the joint management the entire control of their respective roads, shops, depots, furniture, machinery, tools, or other property necessary for the proper maintenance and working of the joint roads, reserving only to the separate management of each corporation such property as is hereinafter specified.

Article II.

The contracts now existing between the Nashua & Lowell Railroad Corporation and the Wilton Railroad Company and the Stony Brook Railroad Company shall be assumed on behalf of the Nashua & Lowell Railroad Corporation by the parties hereto, jointly, and the income, expenses, and liabilities incident to the working of the same shall be embraced in the current joint account of these parties; and the said Wilton railroad contract, which expires on the first day of April, A. D. 1858, may be renewed during the continuance of this agreement at the pleasure of the Nashua and Lowell Railroad Corporation, or, in case of its non-renewal, the decrease of joint income and expense caused thereby shall thereafter be equitably considered in the division account between these parties.

All contracts for the transportation of property or persons heretofore made by either party and still remaining in force shall be assumed and carried out by these joint parties, and the receipts from the same for the current time be put into the joint income. All contracts for supplies necessary for the ordinary operation and maintenance of the roads now made by either party shall be assumed by the joint parties hereto and settled from the joint funds.

Article III.

There shall be reserved to the separate use and control and to be maintained at the separate expense of each party owning the same all lands which are not a part of their depot grounds or right of way or required for the convenient and economical operation of the roads; all buildings not required in connection with the service of the roads, and also all personal property of each corporation accumulated to the date of this contract, excepting the rolling stock, tools, materials, and fuel on hand, which shall be particularly appraised into the common stock; the said reserved lands, buildings, and movable property other than cash and paper securities reserved as above to the separate use and charge of each party owning the same, being particularly specified as follows, viz:

To the Nashua & Lowell Railroad Company.—Their vacant lot lying between the Western avenue and the Pawtucket canal, in Lowell, containing about 133,000 square feet; lot containing about 3,900 square feet, with building thereon, situated in Lowell, on east side of Fletcher street between Dutton street and Pawtucket canal, now rented for a flour store; the two-story dwelling and lot attached opposite the depot at North Chelmsford, now rented to Rev. B. F. Clark; the rooms now rented and to let in their railroad buildings

at Nashua, except the express and refreshment room in passenger station.

To the Boston & Lowell Railroad Company.—The flats at East Cambridge and Boston outside of the location of the road and below tide; their brick block of five houses on Andover street, Boston, and so much of their land northwest thereof fronting on Andover and Minot streets as will not be required for the convenient access and egress of the engines and trains to and from the passenger station; all lands between the Fitchburg crossing at Somerville and the arch bridge in Lowell, which are outside of the location or fence and not wanted for the service of the roads; J. A. Ames's store, at Wilmington; John H. Pearson's store, at Lowell; land on Adams and Worthen streets, Lowell, leased to A. L. Brooks & Co.; land on Fletcher and Dutton streets, Lowell, leased to A. L. Brooks & Co.; store at corner of Dutton and Fletcher streets, Lowell, leased to John O'Connor; all lands owned by them jointly with the Eastern railroad Company on southeasterly side of Causeway street, in Boston.

Article IV.

Each party shall be separately liable for its unsettled claims or accounts up to the date of this agreement, or for any action brought on account of anything previous thereto, but all liabilities growing out of or arising under this contract and not specially excepted herein shall be met from the joint income.

Article V.

The joint roads shall be operated and managed by one agent,
51 who shall be chosen by the concurrent vote of a majority of the directors of each party, and may be removed in like manner or by the unanimous vote of either board, and the respective boards of directors shall by such concurrent action exercise the same control over the management as is usual with boards of railroad directors in ordinary cases.

Article VI.

The party of the first part shall complete within the year 1857, at its own separate cost, the new passenger depot at Causeway street, in Boston, together with the tracks, bridges, and all necessary fixtures connected with the said extension into the city of Boston, and also, at its own separate expense, make such alterations in the present Boston passenger depot as have been designed by said Boston & Lowell Railroad Company for converting it into a freight depot. The said first party shall also cause to be completed, without charge to the second party and at the earliest practicable time, the crossing over the Fitchburg railroad, now being constructed, and also the connection with the Grand Junction road, at the same place, as soon as can be done at reasonable cost to the Boston & Lowell road.

Article VII.

The party of the second part shall, at its own separate cost and within the year 1857, erect a freight depot, with its necessary approaches and furniture, in the city of Lowell, upon their site on Western avenue, which, during the continuation of this agreement, may be used for the accommodation of the joint business, said building to be one story in height and not less than three hundred feet in length, as may be required for such accommodation.

Article VIII.

The road-bed, bridges, superstructure, depots, buildings, and fixtures of each road shall be kept, as near as may be, in like relative repair from their present state and condition, and all casualties and damages to the same (fire risks on buildings excepted) shall be at the common risk and charged in the current joint account. The risk of destruction or damage by fire to all buildings shall be borne by the parties owning the same, respectively, and in case of destruction or injury to any of said buildings by fire the party owning the same shall proceed at once, at its own separate cost, to rebuild or replace said building, or such substitute therefor, as the wants of the joint business may require, provided such party shall not, at its separate cost, be required to erect a more expensive building in any case than the one injured or destroyed.

52 Article IX.

The cars, engines, and furniture of each road, with stationary engines and tools in machine shops and for road repairs, shall be accurately inventoried and appraised by persons mutually agreed upon for this purpose and be kept in equal comparative repair from their present state and condition, and any additions to the same, above what is necessary to cover depreciation, made during the continuance of this contract shall belong to the respective parties in the same proportion as is hereinafter agreed upon for the division of the joint income.

Article X.

A full inventory and appraisal shall also be made, by persons mutually agreed upon for this purpose, of all stock in the machine shops and wood and oil or other operating materials on hand and owned by each separate party at the commencement of this contract, and the amount of such appraisal shall be charged to the current joint expense account, accrediting to the respective parties the portion put by each into the common stock, and on the termination of the contract all such common stock and materials remaining on hand shall be apportioned between the parties in the same ratio as is hereinafter provided for the division of the joint income.

Article XI.

The salaries of presidents, directors, treasurers, clerks, or servants of each separate corporation as such shall be paid from the separate fund of each, and not from the joint account.

Article XII.

The annual tax assessed by the State of New Hampshire upon the Nashua & Lowell and Wilton railroads shall be considered an ordinary expense and paid, for the current time, from the joint funds in the same manner as taxes upon all other property in joint use and not elsewhere reserved to the separate control and maintenance of each party.

Article XIII.

The insurance premiums paid by either party or unexpired policies for the risk upon cars, engines, tools, freight, wood, or other things which are hereby agreed to be at the common risk, shall be apportioned in such manner as to become a common charge from and after the date of this agreement, each party paying its own premium for the portion of time up to the said date and charging to the joint account the unexpired portion, and the same apportionment shall be made of any and all payments for rents made
53 by either party for a time extending beyond this date and inuring to the common benefit.

All prepayments to either party on transportation account, for season or package tickets, or any other prepaid income, except rents from reserved buildings, shall be apportioned as above, and each party shall be charged, to the benefit of the joint account, with their collections on such unexpired portion of said prepayment.

Article XIV.

The income and expense accounts of the joint roads shall be made up, as nearly as conveniently may be, by estimate to the close of each month, and the net balance appearing shall be divided, upon the general basis of division hereinafter stated, and paid over, on account, to the respective treasurers of the parties, subject to a final adjustment at the semi-annual closing of the accounts.

On and to the first days of April and October in each year the said accounts shall be accurately closed and balanced out by settlement with each party covering and adjusting all previous payments on account, the party of the first part receiving as its proportion sixty-nine per cent. and the party of the second part thirty-one per cent. of said joint net income, the said thirty-one per cent. to said second party being in full for the net proportion of the Nashua & Lowell and Wilton roads, but not including the dividend of the Stony Brook road, which, in a previous article, is provided to be paid from the joint fund; and each party may, separately and on its own account, declare such dividends upon its own stock and payable from its own separate funds as it may deem expedient, it being hereby distinctly provided that the interest upon the debts of either party must also be paid out of such separate share and not from the common fund.

Article XV.

This indenture shall be construed as a business contract solely, and in no sense as a lease of one road to the other or as a union of the corporate powers or privileges, each party retaining to itself all of its chartered rights and liabilities and the power to sue or the liability to be sued in its own separate name and capacity in the same manner and to the same extent as heretofore, excepting that in so far as between these parties the rights and liabilities of one with the other shall be settled and determined by this agreement.

Article XVI.

For the purpose of facilitating the execution of any of the improvements contemplated or work to be done by either party on its own account, as heretofore specified, it is hereby agreed that
54 all use of the joint roads, machinery, or property required for such purpose shall be permitted, so far as the same does not conflict with the proper transaction of the joint business and the cost thereof, without profit, charged to the party so using.

Article XVII.

Any controversies arising as to the true intent and meaning of this contract or its proper fulfilment may at any time be submitted, at the request of either of the parties, to William H. Swift, of Boston George Y. Sawyer, of Nashua, and James B. Francis, of Lowell, the report and order thereon of a majority of whom shall be final.

If a vacancy shall occur in such board of arbitrators some other persons or persons shall be appointed by the directors by mutual agreement, or, in case they are unable to agree, the remaining arbitrator or arbitrators shall make such appointment.

Article XVIII.

This contract shall take effect on the first day of February, A. D. 1857, and shall continue in force until the first day of April, A. D. 1860, unless annulled by vote of the stockholders of either road, as hereinafter provided, it being understood and agreed that either of said corporations shall have power to terminate the same at their first meeting next succeeding the date hereof or any subsequent meeting holden within sixty days after the first day of April, A. D. 1858; otherwise it is to remain in force the full term aforesaid.

In witness whereof the president of the respective corporations, duly authorized thereto, have hereunto subscribed their names and affixed the seals of said corporations the day and year first above written.

WM. PARKER, [L. S.]
President Boston & Lowell Railroad Corporation.
F. B. CROWNINSHIELD, [L. S.]
President Nashua & Lowell Railroad Corporation.

In presence of us :
GEO. STARK.
T. P. TENNEY.

At a meeting of the directors of the Nashua & Lowell Railroad Corporation, held in Boston on the twenty-ninth day of January, A. D. 1857, it was voted—

"That the agreement made with the Boston & Lowell
55 & 56 Railroad Corporation for the joint running of the two roads be ratified and adopted by this board, and that the president be authorized to sign the same on behalf of this corporation."

A true copy of the record.
Attest: GEO. STARK, *Clerk.*

At a meeting of the directors of the Boston & Lowell Railroad Corporation, held in Boston on the 29th day of January, A. D. 1857, it was voted—

"That the agreement made with the Nashua & Lowell Railroad Company for the joint running of the roads be ratified and adopted by this board, and that the president be authorized to sign the same on behalf of this corporation."

A true copy of the record.
Attest: THOMAS P. TENNEY, *Clerk.*

57 On the first day of October, A. D. 1883, the following answer was filed:

Answer of Hocum Hosford's Executors. (*Filed Oct.* 1, 1883.)

The answer of George F. Richardson, Rebecca T. Hosford, and Arthur G. Pollard, executors of the last will and testament of Hocum Hosford, deceased, one of said defendants, to the bill of complaint.

And now the said Richardson, Hosford, and Pollard, executors as aforesaid, come and, for answer to said bill of complaint or to so much thereof as they are advised it is material or necessary for them to answer, say that they are informed and believe that the said Hocum Hosford, on or about the thirteenth day of July, A. D. 1875, was appointed the joint agent or manager of the Boston and Lowell Railroad Corporation and the Nashua and Lowell Railroad Corporation for the purpose of managing said two railroads under and in pursuance of the contract referred to in said bill of complaint; but these defendants, on their information and belief, deny that he became such manager for the purpose of taking and paying over the net earnings of said railroads under and in pursuance of said contract, or that any of the net earnings of said railroads came into his hands as such agent or manager, or that as such agent he became bound to administer and account for the net earnings of said railroads; and these defendants, upon their information and belief, deny that as such agent the said Hocum Hosford came into the receipt and possession of the revenues or net earnings of said rail-
58 roads, or that he continued in such receipt and possession from the — day of April, A. D. 1875, until the fifth day of

April, A. D. 1881, when he deceased, or that during all of said time he took or continued to take large sums of money out of the proper share of said joint earnings or revenue, which, under said contract, belonged solely to said Nashua and Lowell Railroad Corporation, and paid over the same from time to time or caused the same to be paid over to the treasurer of the Boston and Lowell Railroad Company, in violation of any duty or trust devolving upon said Hocum Hosford by virtue of said contract between said railroads or otherwise; and, on their information and belief, these defendants admit that while said Hocum Hosford was agent and manager as aforesaid he was also one of the directors of the Boston and Lowell Railroad Corporation and the owner of a large number of shares therein; and, on their information and belief, these defendants deny that said Hocum Hosford or his servants or agents took any sums out of the share of the net earnings belonging to said Nashua and Lowell Railroad Corporation and paid over the same to the Boston and Lowell Railroad Corporation, or that any such sums were taken without the consent or authority of said Nashua and Lowell Railroad Corporation and ought to be accounted for to said last-named corporation without interest thereon; and these defendants admit that said Hocum Hosford died about the 5th of April, A. D. 1881, testate, without having answered said bill of complaint, and that these defendants are his duly appointed executors.

And these defendants, without waiving any other defence herein set forth, further answering, say that subsequent to the filing of said bill of complaint in the court aforesaid, to wit, on the thirtieth day of September, A. D. 1882, the said Nashua and Lowell Railroad Corporation and the said Boston and Lowell Railroad Corporation, by an instrument in writing, a copy of which is hereto annexed, marked "Exhibit No. 1," referred to the arbitration of Elias Merwin, William S. Gardner, and Waldo Colburn the claims embraced in the said bill of complaint and of all other claims of either of said corporations against the other, with the agreement that the award of said arbitrators or the greater part of them should be final; and
59 these defendants say that, in pursuance of said agreement for arbitration, said corporations were duly notified by said arbitrators and fully heard, and that said arbitrators in pursuance of said agreement made their award in writing, settling and determining all claims of either of said corporations against the other and all claims embraced in said bill of complaint, a copy of which award is hereto annexed, marked "Exhibit No. 2," and that by virtue of said arbitration and award all claims of said Nashua and Lowell Railroad Corporation against said Boston and Lowell Corporation and against said Hocum Hosford, as agent and manager as aforesaid, and against these defendants as his executors were settled, determined, and released.

And these defendants, without waiving any of the defences herein set out, for further answer, say—

First. That the plaintiffs have not in and by the said bill of complaint made or stated such a case as entitles them in a court of

equity to any discovery or relief from these defendants as to the matters contained in said bill or any of such matters.

Second. That, as appears by said bill, the plaintiffs have a full, complete, and adequate remedy at law for all the claims, matters, and things therein set forth.

Third. That it appears by said bill that the same is exhibited against these defendants and the other defendants therein named for distinct matters and causes, in several of which, as appears by said bill, these defendants are in nowise interested or concerned; and that, as appears by said bill, several distinct and independent claims and causes of action are set forth against these defendants in nowise connected with or dependent upon each other; and, further, that the said bill is altogether multifarious.

Fourth. That the Boston and Lowell railroad and C. E. A. Bartlett are joined and made defendants in said bill with these defendants, when it appears by the allegations, claims, and charges in said bill set forth that these defendants and said Bartlett have no interest in the subject-matter of said bill, and are not jointly or severally liable with the defendant corporation, if at all, and if the said defendant corporation should be adjudged liable upon the claims and charges in said bill against the defendants therein.

And these defendants, without waiving any of the defences
60 herein set out, further answering, say that the Boston and Lowell Railroad Corporation is a corporation chartered by the Commonwealth of Massachusetts, and duly exists by virtue of the laws thereof, and is a citizen of said Commonwealth, and that all the defendants named in said original complaint and these defendants are also citizens thereof, and that the Nashua and Lowell Railroad Corporation was originally chartered by the State of New Hampshire on the twenty-third day of June, A. D. 1835, by an act which authorized the construction of a railroad from Nashua, in said State, to the State line of the Commonwealth of Massachusetts, a distance of about four miles; that on the tenth day of April, A. D. 1838, the Commonwealth of Massachusetts granted a charter authorizing the construction of a railroad from the State line in New Hampshire, at the termination of the said Nashua and Lowell railroad in New Hampshire, to Lowell, in said Commonwealth, a distance of about eleven miles; that in the year 1838 the Legislatures of Massachusetts and New Hampshire authorized the union of these two corporations in one, and they were so united, and, as such united corporation, they issued common stock, constructed said railroad from Lowell aforesaid to said Nashua, and have always operated the same as one corporation; and said united corporation is the complainant in said bill of complaint and the same with which the contract with the Boston and Lowell Railroad Corporation, referred to in complainant's bill of complaint, was made; and these defendants allege that if any claims can be maintained upon the facts alleged in said bill of complaint they can only be maintained by virtue of the contract between the Boston and Lowell Railroad Corporation, a citizen of Massachusetts, and the Nashua and Lowell Railroad Corporation, united as aforesaid, citizens of

Massachusetts and New Hampshire, and the Nashua and Lowell Railroad Corporation of Massachusetts, a citizen of Massachusetts, should be made a party to this bill.

Wherefore these defendants pray that they may be discharged and for their costs.

GEORGE F. RICHARDSON,
ARTHUR G. POLLARD,
Executors of the Last Will and Testament of Hocum Hosford, for Themselves and Rebecca T. Hosford, Coexecutor.

61–65 MIDDLESEX, *ss:*

OCT. 1, 1883.

Then personally appeared the above-named George F. Richardson and Arthur G. Pollard, executors, and made oath to the truth of the foregoing answer by them subscribed, except as to those matters which are stated upon information and belief, and those they believe to be true.

Before me—

[SEAL.] CHAS. C. HUTCHINSON,
Notary Public.

EXHIBIT No. 1.

(MEMORANDUM.—This Exhibit No. 1 is not printed here, as it is the same as Exhibit E, annexed to the answer of the Boston and Lowell Railroad Corporation and printed with that answer.)

EXHIBIT No. 2.

(MEMORANDUM.—This Exhibit No. 2 is not printed here, as it is the same as Exhibit F, annexed to the answer of the Boston and Lowell Railroad Corporation and printed with that answer.)

* * * * * * *

66 On the said seventeenth day of November, A. D. 1883, the following replication was filed:

Replication. (*Filed Nov.* 17, 1883.)

The replication of the Nashua and Lowell Railroad Company to the answer of George F. Richardson, Rebecca T. Hosford, and Arthur G. Pollard, executors of the last will of Hocum Hosford and defendants to the bill of revivor.

This repliant, for replication to said answer, says that it will aver and prove its said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that said answer of said defendants is uncertain, untrue, and insufficient to be replied to by this repliant, without this, that any other matter or thing whatsoever in said answer contained material to be replied to, traversed, or denied is

true; all which matters and things this repliant is ready to aver and prove as this honorable court may direct.

By F. A. BROOKS,
Its Solicitor.

67–71 On the third day of December, A. D. 1883, the motion of complainant to strike out demurrer filed September 4th, A. D. 1882, was heard before the Honorable Thomas L. Nelson, district judge; whereupon it was ordered that the said motion and the motion filed November 17, A. D. 1883, be denied.

This cause was thereupon set down for hearing and fully heard before the Honorable Thomas L. Nelson, district judge, upon the several demurrers of the defendants, Bartlett and The Boston and Lowell Railroad Company, filed Nov. 9, A. D. 1883, to the amended bill of complaint.

On the twenty-fifth day of March, A. D. 1884, the opinion of the court was announced and the said demurrers were overruled.

This cause was thence continued to the May term, A. D. 1884, when, on the fifteenth day of May, A. D. 1884, the following answer was filed:

* * * * * * *

72 On the tenth day of June, A. D. 1884, the following answer of Boston and Lowell Railroad Corporation was filed:

Answer of Boston and Lowell Railroad Corporation. (*Filed June* 10, 1884.)

And now comes The Boston and Lowell railroad, one of the defendants, and, reserving to itself all and all manner of benefit or advantage of exception that can or may be had to the manifold uncertainties, errors, omissions, and imperfections in the bill of complaint as amended, answers to so much thereof as it is advised it is material and necessary to make answer, as follows:

First. It denies that the plaintiff is a citizen of the State of New Hampshire; but avers that it is a citizen of the State of Massachusetts.

Second. It admits and avers that all the defendants are and at the time of filing the bill of complaint were citizens of the State of Massachusetts.

Third. It denies that the Nashua and Lowell Railroad Corporation is or for a great number of years has been a corporation, under the laws of the State of New Hampshire, owning a railroad extending from Nashua, in New Hampshire, to Lowell, Massachusetts; but it admits and avers that the defendant corporation is and for
73 a great number of years has been a corporation under the laws of the State of Massachusetts, owning a railroad extending from said Lowell to the city of Boston, Massachusetts; and it further avers and alleges that by an act of the Legislature of the State of New Hampshire and by an act of the Legislature of the Commonwealth of Massachusetts, the former enacted on the twenty-

sixth day of June, A. D. 1838, and the latter enacted on the tenth day of April, A. D. 1838, the said Nashua and Lowell Railroad Corporation, created by the laws of the State of New Hampshire, and the Nashua and Lowell Railroad Corporation, created by the laws of the Commonwealth of Massachusetts, were united and made one corporation, and that said two last-named corporations accepted said acts of said two States and organized under the same, and constructed and owned a railroad extending from Nashua, in the State of New Hampshire, to Lowell, in Massachusetts; and this defendant avers that the said Nashua and Lowell Railroad Corporation, created by the laws of New Hampshire, never owned a railroad extending as aforesaid from Nashua to Lowell, and never made the contract set forth in the complainant's bill of complaint and made a part thereof; but it alleges and avers that said contract was made by the corporation created by the laws of the State of Massachusetts and the laws of the State of Hampshire, and this defendant annexes copies of said four acts of the Legislatures of New Hampshire and Massachusetts, and makes them a part of this answer.

Fourth. It denies that it ever entered into any joint-traffic contract with the Nashua and Lowell Railroad Corporation, a corporation existing under the laws of the State of New Hampshire; but it says that it made and executed with the Nashua and Lowell Railroad Corporation, a corporation duly established by the laws of the State of Massachusetts, and the Nashua and Lowell Railroad Corporation, a corporation duly established by the laws of the State of New Hampshire (which were united as hereinbefore alleged and set forth), a joint-traffic contract, and it admits that the copy filed in this court on the sixth day of November, 1883, and made part of the amended bill of complaint is a true copy of said contract.

Fifth. It admits that said last-named contract was duly and legally ratified by the stockholders of the corporations, parties
73*a* thereto, and that the execution thereof was entered upon and continued for the full term of twenty years from the first day of October, 1858.

Sixth. It denies that the parties to said contract ever intended to become or did in fact become copartners for any purpose; but it admits that the Nashua and Lowell Railroad Corporation, created as aforesaid by the laws of New Hampshire and the laws of Massachusetts, "became entitled to thirty-one per cent. of the net earnings or income of said railroads, to be operated jointly for said term of twenty years," as provided in article XIV of said contract, on the first days of April and October in each year.

Seventh. It admits that it was not provided in said contract that either of the parties thereto should "bear any outlay or expense incurred by the other in improving, enlarging, or increasing its own property or estate or in rendering the same more costly or valuable than it was at the inception of the contract, except so far as such outlay might be required by way of repairs or rental."

Eighth. It admits that at the time of making said contract the passenger station occupied by the Boston and Lowell Railroad Corporation in Boston was on Minot street, and that said Boston and

Lowell Railroad Corporation became bound to provide and pay for a new station, to be located on Causeway street, without cost or charge to the Nashua and Lowell Railroad Corporation; but it avers that it did erect said passenger station on Causeway street, as called for by the contract, without any cost or charge therefor to the Nashua and Lowell Corporation, and that said station was used for the joint business of the combined roads, without any charge therefor to the Nashua and Lowell Railroad Corporation, for a great number of years, and until the directors of the two roads decided that it would be for the joint interest of the parties to the contract that a larger station should be erected for the accommodation of the increased business of the joint roads.

A new station was thereupon built at the expense of the Boston and Lowell Railroad Corporation upon the express agreement and understanding between said two corporations, parties to said contract, that it was to be paid interest at the rate of seven per cent. per annum, payable semi-annually, out of the receipts of the joint
73*b* corporations under the said contract upon all sums expended for said station.

Ninth. It denies that it was ever agreed by the defendant that the track of the Nashua and Lowell Railroad Corporation was, at the inception of said contract, in a better relative condition than that of the Boston and Lowell Railroad Corporation to the extent or excess in value of three hundred tons of new rails over three hundred tons of old rails, and that this excess of value was to be made good or allowed and accounted for by the Boston and Lowell Railroad Corporation to the Nashua and Lowell railroad at the termination of the contract.

Tenth. It admits that George Stark became joint agent or manager of both railroads under the joint contract, and so continued until April, 1875, and that he was succeeded by Hocum Hosford as such joint agent, and that Charles E. A. Bartlett was elected Aug. 28, 1876, cashier and custodian of the funds of the two roads under the joint management, and so remained up to the expiration of said contract, in 1878, and that during said period said Bartlett was and now is the treasurer of the Boston and Lowell Railroad Corporation.

Eleventh. It admits that in 1871 it bought a majority of the shares of the capital stock of the Lowell and Lawrence and of the Salem and Lowell Railroad Corporations for the sum of $345,674, and that the said railroads were then under lease to it and were being operated for the joint account of the parties to said joint contract.

Twelfth. It denies that no modification of the terms of the joint-traffic contract was ever made with the consent of the plaintiff, except so far as related to the hiring or operating on joint account of the Salem and Lowell and Lawrence and Lowell railroads, of the Stoneham Branch, the Lexington and Arlington, the Middlesex Central, and the Peterboro' railroads, and to the hiring of Phillips' wharf, in Salem, and to the acquisition of the Mystic wharf property.

Thirteenth. It denies that during the year 1872 and thereafter until the termination of the joint contract all the receipts
73c and income of the combined railroads under the control of the joint agent went into the possession of the treasurer of the Boston and Lowell Railroad Corporation: but it says that all such receipts and income went into the possession of the said Bartlett as the duly elected cashier of the combined roads, and the Boston and Lowell Railroad Corporation had no control or direction of said Bartlett as such cashier, except such as it exercised jointly with the other party to said contract.

Fourteenth. It denies that any portion of the income or earnings due the Nashua and Lowell railroad under said contract has ever been withheld or paid over to the treasurer for the time being of the Boston and Lowell Railroad Corporation or has been taken and appropriated by the last-named corporation, contrary to the meaning and provisions of said joint-traffic contract.

Fifteenth. It denies that it ever took, appropriated, or in any way received in excess of its own proper share of the earnings of the combined roads, parties in this contract, the whole or any part of the sums, amounting to $181,962, described in the bill of complaint as being equal to thirty-one per cent. of the interest (reckoned at seven per cent. per annum) upon the entire outlay in the erection of the new passenger stations in Boston and in Winchester and in building the Mystic River railroad.

Sixteenth. It denies that it ever took or appropriated or in any way received in excess of its proper share of the net earnings of the combined roads the whole or any part of the sums described in the bill of complaint as being equal in amount to thirty-one per cent. of the interest (reckoned at seven per cent per annum) upon the cost of shares of stock owned by the Boston and Lowell Railroad Corporation in the Salem and Lowell and the Lowell and Lawrence railroads, after deducting therefrom the amount of dividends received thereon.

Seventeenth. It admits that it received the sums set forth in the last two clauses, amounting in all to the sum of $208,086; but it avres that said sums were rightfully and properly received by it under the said joint contract and the subsidiary or additional contracts or arrangements hereinafter set forth.

Eighteenth. It alleges that the said joint contract contained
73d no provisions whereby either of the parties to it was obliged to expend any money in adding to its plant or in increasing its facilities to do the joint business of the said parties to said contract; but as the business of the two roads increased it became evident from time to time that it was for the mutual interest of said parties, and absolutely necessary in order to transact the business under said contract, and to keep up, add to, and increase the receipts and profits of the said business provided for by said contract, that certain expenditures should be made for permanent improvements upon the said railroads and property belonging to each of said parties, and it was considered equitable that each party that should make expenditures for permanent improvements that would benefit

both parties during the continuance of the contract should be allowed interest upon such expenditures at the rate of seven per cent., and such interest should be charged to the joint account as part of operating expenses of the combined roads. Under this understanding, and with the knowledge and consent of both parties, a great amount of money was expended at different times by both parties, and both parties, until the expiration of said contract, received the benefit of such expenditures.

Nineteenth. In 1872 it was deemed necessary, for protection of the joint business and interests of the parties to the traffic contract, to obtain control of the Salem and Lowell and the Lowell and Lawrence railroads, and it was thereupon agreed between said parties that if the Boston and Lowell Railroad Corporation would buy a majority of the stock in said companies that it should be paid seven per cent. semi-annually upon the money used for the purchase of said shares during the continuance of the contract. With the full knowledge and consent of the other party to the contract, the Boston and Lowell Railroad Corporation thereupon bought a majority of the shares of stock of the two companies aforesaid and paid therefor the sum of $345,674, and interest upon said sum was thereafter paid to the said Boston and Lowell Railroad Corporation, with the full knowledge and consent of the second party, until the termination of said contract, and during said time the benefits arising out of said purchase were enjoyed by both said parties.

Twentieth. In like manner it became necessary to expend
73e large sums, as alleged in the bill, to build a new station in Boston, and to build a new station and to make certain improvements in Winchester and to build the Mystic River railroad, and it was agreed between the parties to the traffic contract that if the Boston and Lowell Railroad Corporation would build stations and railroad it should be paid interest upon all sums expended for such purposes, including interest upon such sum, not exceeding twenty thousand dollars, as should be paid for land for railroad purposes in said Winchester, at the rate of seven per cent. per annum, at the end of each six months, out of receipts of the joint corporations under said contract. Relying upon the agreement and upon the vote of the directors of the Nashua and Lowell Railroad Corporation, which vote is set out in the plaintiff's bill as the vote of July 23, 1872, the Boston and Lowell Railroad Corporation expended large sums of money for the purpose before mentioned, and during the continuance of the joint-traffic contract the said buildings, roads, and improvements were used for the business of the combined roads in the same manner as if they had formed a part of its original plant at the time of making said contract.

Twenty-first. It avers that the said vote of July 23, a copy of which is set out in the plaintiff's bill, was legally and properly passed at a meeting of the directors of the Nashua and Lowell Railroad Corporation.

Twenty-second. It denies that " said vote was not passed at a meeting of the directors of either the plaintiff or the defendant corporation, acting separately and distinctly for the transaction of the busi-

ness of either corporation, and participated in by a single board of directors only, as by law required;" and it denies that it was passed "at a meeting composed of members of both boards of directors, coming together as if members of the same or a single board of directors, and sitting together under one presiding officer, and entertaining business matters and voting thereon as one body or in common or jointly at one and the same time, without division or discrimination or separate action with reference to any difference in the bearing or effect of such vote upon the interests of the two corporations."

Twenty-third. It denies at the "meeting held on the twenty-third day of July, 1872, that a vote wholly favorable to the inter-
73*f* est of the defendant corporation and wholly adverse to the interest of the plaintiff corporation was passed by votes cast by the directors of the defendant corporation or by persons not being directors in the plaintiff corporation at all," and it alleges that it has no knowledge and so cannot admit or deny the allegation that the vote passed July 23 was brought before the meeting or moved by J. G. Abbott, a director in the defendant corporation and not a director in the plaintiff corporation.

Twenty-fourth. It denies that the said vote of July 23d, 1872, was void, but avers that it was a legal and formal vote of the Nashua and Lowell Railroad Corporation, and is and always has been binding upon it, and that the said Nashua and Lowell Railroad Corporation for a great number of years received and enjoyed without objection a large part of the benefit and advantages of such expenditures, and is therefore estopped to deny the validity of said vote.

Twenty-fifth. It denies that said vote of July 23 "did not become known to the stockholders of the Nashua and Lowell Railroad Corporation, not being directors in either of said two corporations, until May, 1877."

Twenty-sixth. It is ignorant whether the directors of the plaintiff corporation ever passed the vote of June 25, 1877, and leaves the plaintiff to prove its allegations in regard thereto if material.

Swenty-seventh. It denies that all the receipts or earnings of the combined railroads under said traffic contract, from the appointment, in 1875, of the defendant Hosford as joint agent or manager until the termination of the said contract, went into the hands or possession of the defendant Hosford, but alleges that such receipts went into the hands of the said cashier, Bartlett; but it admits and alleges that it was the duty of said Hosford to see that each party to said contract received its proper share of said joint earnings; but it denies that said Hosford, in violation of his trust or duty, caused to be paid over to the defendant corporation, in excess of its share of said net earnings, large sums of money, or any sums of money, making part of the share of the plaintiff corporation in said net earnings.

Twenty-eighth. It denies that it ever received from said
73*g* Hosford or from any other source whatever any sums of

money as part of the joint earnings of the two railroads under said traffic contract to which it was not legally entitled.

* * * * * * *

Thirty-first. It denies that its president, J. G. Abbott, has any authority to answer this bill in its behalf, but says that the only person authorized to answer for it is its treasurer, C. E. A. Bartlett.

Thirty-second. In respect to all the special interrogatories contained in the plaintiff's bill, so far as they relate to the circumstances attending the passing of the said vote of the Nashua and Lowell Railroad Corporation of July 23, 1872, it says that it knoweth not and cannot therefore answer them; but it says that the Nashua and Lowell Railroad Corporation, having permitted it to
73*h* make great expenditures of money, relying upon said vote, and having enjoyed the benefits of such expenditures for a great number of years, is now estopped to deny the validity of said vote.

Thirty-third. This defendant avers and alleges that the plaintiff knew of and consented to the erection of the station-house in Boston and of the station-house and purchase of land in Winchester, and of the building of the Mystic River railroad, and that before any expenditure for either of said purchases was made the propriety, desirability, and necessity of the same, so far as the interests of both parties to said contract were concerned, were very often and very freely discussed by the directors of the plaintiff and the directors of the defendant; that the directors of the plaintiff were at all times notified that the defendant would make no expenditure for either of said purposes, except upon the agreement that during the continuance of said contract the defendant was to be allowed out of the joint receipts under said contract interest upon such expenditures at the rate of seven per cent. per annum; and that when the said directors of the plaintiff and of the defendant agreed that the erection of a new station-house in Boston and of a station-house in Winchester were necessary, and to the construction of the Mystic River railroad, it was agreed by the directors of the plaintiff that the defendant was to receive interest on the expenditures for those objects at the rate of seven per cent., during the continuance of the contract, out of the joint receipts therefrom.

And the defendant alleges and avers that it acted upon this agreement of the plaintiff, and would never have made the expenditures for said purposes except for and on faith of said agreement; and, further, that the said agreement was made known to the stockholders of said plaintiff, and that no objection was ever made to such payment of interest on said expenditures to the defendant out of said joint receipts until many years after the same had been made, and that said station-houses and said Mystic River railroad were built and constructed under the supervision of a committee consisting of directors of both the plaintiff and defendant; and, further, that monthly reports were made by the joint manager and agent of both parties to said contract while said expenditures were being made, when the same had been made, setting forth the appropria-
73*i* tion of seven per cent. interest on said expenditures to the

defendant out of the joint receipts, to the directors of the plaintiff and the directors of the defendant, and approved of by both boards of directors; that the allowance of interest on such expenditures to the defendant out of said joint receipts were reported to the stockholders of both corporations, appeared in the report of the board of railroad commissioners of Massachusetts, and was known to all parties having any interest in the business of the defendant and plaintiff; that the plaintiff received during the continuance of said contract its just proportion of all the benefits of said expenditures, which this defendant alleges were very large, and that the joint receipts under said contract were largely increased by said expenditures, and therefore this defendant alleges and avers that the plaintiff is, in law, equity, and good conscience, estopped and barred from now claiming that interest on said expenditures should not be allowed and paid to the defendant out of the joint receipts under said contract.

And the defendant alleges and avers that the plaintiff made expenditures upon its property under the agreement aforesaid of both the plaintiff's and the defendant's directors, that interest on such expenditures at the rate of seven per cent. per annum should be allowed to the plaintiff out of the joint receipts under said contract, and that such interest was so allowed and paid for some years after said expenditures were made.

And this defendant further alleges and avers that the purchase of the stock in the Lowell and Lawrence Railroad Corporation and in the Salem and Lowell Railroad Corporation was discussed and considered by the directors of the plaintiff and the directors of the defendant, and that it was agreed by the directors of the plaintiff and defendant that the interest of both parties required such purchase to be made, and the interest on the expenditure therefor, after deducting dividends, should be allowed and paid to the defendant out of said joint receipts under said contract, and that the directors of the plaintiff well knew the defendant would never have made said purchase except upon the agreement that interest on the same was to be paid it out of the joint receipts under said contract, and that it made such purchase and the expenditure therefor on the faith of said agreement for the payment of interest thereon during
73*j* the continuance of said contract out of the joint receipts therefrom, and would not have made such expenditure if such agreement to pay interest as aforesaid had not been made by the plaintiff.

And the defendant avers that from the time when said expenditures were made monthly reports were made by the joint manager and agent of both parties to said contract to the plaintiff's directors, showing the payment to the defendant of the interest thereon out of the joint receipts under said contract, which were approved by the plaintiff's directors, and that such payment of interest on said expenditures for the purchase of said stock was known to the plaintiff and its stockholders, and was never objected to for many years after such payments had been made, and that the plaintiff enjoyed its just proportion of all the benefits of said purchase during the

continuance of said contract, and therefore the defendant avers and alleges that the plaintiff is estopped and barred from now claiming that interest so paid to the defendant on said expenditures for the purchase of said stock should be disallowed, and that the defendant should account therefor to the plaintiff.

Thirty-fourth. It avers that all the matters and claims set out in this bill were, together with certain other demands and claims between the parties, referred by a submission, which was duly executed and signed and delivered by both plaintiff and defendant, dated the 30th of September, 1882, a copy of which is annexed to and made part of this answer (marked "Exhibit E"), to the Honorable Waldo Colburn, a justice of the supreme judicial court of Massachusetts; the Honorable William S. Gardner, a justice of the superior court of Massachusetts; Elias Merwin, Esq., a counselor of this court, as referees and arbitrators, whose award upon the matters submitted to them was to be final.

The said arbitrators duly notified and heard the parties and thereafter made an award, copies of which submission and award and all the proceedings thereunder are annexed to and made part of this answer (marked "Exhibit F"). In said award the said arbitrators unanimously decided and awarded that the plaintiff was not entitled to recover of the defendant corporation anything on account of the claims set out in its bill in this suit; and it says that said submission and award are a bar to the further maintenance of this bill.

73*k* Thirty-fifth. And this defendant submits that the plaintiff is not entitled to any relief from a court of equity in respect of the matters complained of, and this defendant hopes that he shall have the same benefit of this defense as if he had demurred to the plaintiff's bill.

* * * * * * *

[SEAL.] THE BOSTON AND LOWELL RAILROAD CORPORATION,
By C. E. A. BARTLETT, *Treasurer.*

GEO. A. SAWYER, *Of Counsel.*

COMMONWEALTH OF MASSACHUSETTS:

The answer of the defendant corporation, The Boston and Lowell Railroad Corporation, was taken this ninth day of June, in the year 1884, before me, under the common seal of said corporation, as by their said seal affixed appears.

Witness my hand and notarial seal.

[SEAL.] GEO. A. SAWYER,
Notary Public.

* * * * * * *

73*l* EXHIBIT E.

Whereas certain disputes and differences have arisen between the Nashua & Lowell Railroad Corporation and the Boston & Lowell Railroad Corporation concerning the rights of said corporations under or growing out of a certain joint-traffic contract, so called, between said corporations, entered into in the year 1857 and continued in operation for twenty years from October 1, 1858;

And whereas the Nashua & Lowell Railroad Corporation claims to be entitled to recover of said Boston & Lowell Railroad Corporation large sums of money under and by virtue of the terms of said contract as its share of the net earnings of said two railroads under said contract in excess of all sums ever paid over to or received by it under the same, a specification of which claims is hereto annexed as part hereof, marked "Exhibit 1," but without certainty as to the precise accuracy of the amounts of sums set forth in said specification;

And whereas said Nashua & Lowell Railroad Corporation did, on or about the 17th day of April, 1880, bring its bill in equity in the U. S. circuit court for the district of Massachusetts for the recovery of said sums;

And whereas it has been agreed by and between the said parties to said suit to refer the said claims and all other claims now existing in favor of either party against the other to arbitration, upon the understanding that said arbitrators shall be governed in their determination and award by the rules of law applicable to the case, but without prejudice from any defence, based on the statute of limitations, unless such defence would be good and valid in law if pleaded to the bill in equity aforesaid, commenced April 17th, 1880;

And whereas the Boston & Lowell Railroad Corporation claims to be entitled to recover of the Nashua & Lowell Railroad Corporation certain sums of money, the items of which are specified and shown in the paper marked "Exhibit 2" and annexed as
73*m* part hereof, the said items being eight in number and amounting in all, without interest, to $352,778.78:

Now, therefore, know all men by these presents that the said Nashua & Lowell Railroad Corporation and the said Boston & Lowell Railroad Corporation do hereby submit the demands hereinbefore mentioned and specified and all other demands of either of said corporations against the other which originated before October 1, 1880, to the determination of Elias Merwin, William S. Gardner, and Waldo Colburn, Esquires, the award of whom or of the greater part of whom shall be final; and if either of the parties neglects to appear before the arbitrators after due notice of the time and place appointed for hearing the parties the arbitrators may proceed in its absence, and the arbitrators may make such award respecting costs and expenses as they shall judge reasonable, including a compensation for their own services; and the parties further agree that

they will respectively obey, observe, perform, fulfil, and keep the award of the said arbitrators of and concerning the premises.

It is understood and agreed that the same rule and limitation of time as to the statute of limitations shall govern the arbitrators aforesaid if said statute is pleaded by either party.

Boston, Sept. 30th, 1882.

(Signed) NASHUA & LOWELL RAILROAD CORPORATION,
By F. A. BROOKS, *Pres't & Committee.*

(Signed) THE BOSTON & LOWELL RAILROAD CORPORATION,
By J. G. ABBOTT, *President.*

EXHIBIT 1.

Specification of the claims or demands of the Nashua & Lowell Railroad Corporation against the Boston & Lowell Railroad Corporation embraced in the submission annexed.

1. 31 per cent. of the joint cash fund or working capital remaining in the hands of the treasurer of the Boston & Lowell
73*n* Railroad Company and 31 per cent. of so much of said fund as consists of debts due to said fund.

2. Cost of replacing 300 tons of old rails with new at end of joint contract, as per report of joint committee made Aug. 25, 1857.

Difference in value of rails	$7,500	
Cost of laying same	2,211	87
		9,711 87

To interest since Dec. 1, 1878.

3. Materials of the joint roads taken and used by B. & L. R. Co. in construction of Middlesex Central railroad, leased and operated by Boston & Lowell R. Co., $8,304.25.

Share of Nashua & L. R. Co., 31 per cent., $2,574.32.

To interest since Dec. 1, 1878.

4. Amount expended by B. & L. R. Co. in procuring and erecting Hall's signals on its road from Boston to Woborn, of which 31 per cent., or $7,071.64, was taken out of funds of Nash. & L. R. Co. and charged to said Nash. & L. R. Co. Oct. 1, 1875, in joint books, $7,071.64.

To interest of same since Dec. 1, 1878.

5. To sums taken by Boston & Lowell R. Co. out of the net earnings of the two roads in excess of its proper share (69 per cent.,) and in reduction of the share (31 per cent.) of the Nash. & L. R. Co. of said net earnings and used by said B. & L. R. Co. to pay itself the interest on the cost of shares of the Lowell & Lawrence railroad and of the Salem & Lowell railroad, owned by said Boston & Lowell R. Co., viz:

For the year ending Sept. 30, 1871		$1,865	and int. since.
"	" 1872	3,795	"
"	" 1873	3,899	"
"	" 1874	3,899	"
"	" 1875	3,899	"
"	" 1876	3,520	"
"	" 1877	3,773	"
"	" 1878	3,773	"
		28,423	

For the two months ending Dec. 1, 1878 ---- ——int. since.

730 6. The sums in excess of 69 per cent. taken by the Boston & Lowell R. Co. out of the joint net earnings belonging to Nashua & Lowell R. Co. and employed to pay itself 31 per cent. of the interest on the cost of constructing the Mystic River Branch railroad and the new passenger stations at Boston and Winchester, all the sole property of said Boston & L. R. Co., meaning the sums so taken out of the share of net earnings belonging wholly to the Nashua & L. R. Co.

For year ending Sept. 30, 1872, viz:		
Taken to pay int. on cost of Boston station	$6,204	
" " Mystic R. B. R.	1,123	
" " Winchester station	317	
		$7,544
For year ending Sept. 30, 1873, viz:		
Taken to pay int. on cost of Boston station	$17,753	
" " Mystic R. B. R.	3,053	
" " Winchester station	434	
		21,250
For year ending Sept. 30, 1874, viz:		
Taken to pay int. on cost of Boston station	$23,745	
" " Mystic R. B. R.	3,597	
" " Winchester station	434	
		27,776
For year ending Sept. 30, 1875, viz:		
Taken to pay int. on cost of Boston station	$26,052	
" " Mystic R. B. R.	4,753	
" " Winchester station	434	
		31,239
For year ending Sept. 30, 1876, viz:		
Taken to pay int. on cost of Boston station	$26,060	
" " Mystic R. B. R.	4,733	
" " Winchester station	434	
		31,227
For year ending Sept. 30, 1877, viz:		
Taken to pay int. on cost of Boston station	$26,040	
" " Mystic R. B. R.	4,989	
" " Winchester station	438	
		31,467
		$181,962

73*p* For two months ending Dec. 1, 1878, viz:

Taken to pay int. on cost of Boston station.
" " Mystic R. B. R.
" " Winchester station.
Add interest from date of payment of each.

7. 31 per cent. of sums paid out of joint funds during 6 months ending March 31, 1867, for land purchased on account of Boston & Lowell R. Co. and owned by said company, viz.:

Paid C. P. Talbot for land at No. Billerica	$100 00
" Tweed & Reed " in Woburn Centre	4,345 00
" G. C. Allen " " "	375 49
	$4,920 49
31 per cent. of above am't	1,494 34

Interest of $1,494.35 since March 31, 1867.

8. The above claims are, however, subject to be reduced to the extent of $11,976 and interest thereon since March 31, 1877, said sum having been paid over to the Nashua & L. R. Co. by the Boston & Lowell R. Co. as 69 per cent. of the interest of the cost of the new freight-house at Lowell, built and owned by the Nashua & L. R. Co., and which the Nashua & L. R. Co. had received from the Boston & L. R. Co. without any lawful right thereto.

They are also to be reduced to the extent of $2,945 more, or 31 per cent. of the cost of the locomotive engine "Boardman," allowed by mistake to the Nashua & L. R. Co. on division of the rolling stock in 1880.

9. And in case the Boston & Lowell R. Corporation shall present to the arbitrators any demand in its favor against the Nashua & Lowell R. Corporation growing out of transactions between the two corporations since Dec. 1, 1878, and not otherwise, then the Nashua & Lowell R. Corporation will also present to said arbitrators the following demands in its favor against said Boston & Lowell Railroad Corporation arising since Dec. 1, 1878, to apply by way of set-off against such demands of the Boston & Lowell R. Corporation:

73*q* For use of its share of the Boston freight-houses and grounds for 22 months, ending Oct. 1, 1880, being at the rate of 5 per cent. per annum on 31 per cent. of the cost of said premises	$8,738 13
For one-third amount receiv'd by B. & L. R. Co. of Fram. & L. R. Co. for use of Middlesex St. station, 22 months	2,200 00
For mail service performed by N. & L. R. Co.	1,638 70
For 69 per cent. of cost of repairing Peterboro' bridges on termination of joint-traffic contract	3,860 77
For salaries, Oct. & Nov., 1880, of pres't and treas. more than allowed by lease	283 34
	$16,720 94

For interest of above since Dec. 1, 1880:

For am't annual fee N. H. R. R. commissioners, 1881, p'd	$35 00
For am't annual fee N. H. R. R. commissioners, 1882, p'd	35 00

And in case the referees shall entertain claims made by the Bost. & Lowell R. R. Co. growing out of leases of other roads or property taken by either party during the joint contract on joint account, but not otherwise, then the Nash. & Lowell R. Co. will claim of the Bost. & L. R. Co. its share, or 31 % of all losses incurred by the hiring of the Middlesex Central & the Lexington & Arlington railroads and of Phillips' wharf at Salem.

Claims of The B. & L. R. R'd vs. The N. & L. R. R'd.

1. 69 per cent. of rental from Jan. 1, 1874, to Dec. 1, 1878, paid Peterboro' railroad, and interest from date of each payment (interest not included in this amount)	$112,543 03
2. 69 per cent. of the loss in the operation of said Peterboro' railroad during the term aforesaid, and interest on said loss (interest not included in this amount)	141,439 12
73r 3. 31 per cent. of the rental of dwelling-house at Lowell occupied by joint agent from Sept. 30th, 1860, to Dec. 1, 1878, at $500 per annum, and annual interest on same (interest not included in this amount)	$2,635 00
4. 31 per cent. of cost of locomotive Boardman, purchased by funds of B. & L. R. r'd, and interest (see vote of directors Aug. 25, 1857) (interest not included in this amount)	2,945 00
5. 31 per cent. of cost of temporary train-shed in Boston during construction of the passenger station, the material being afterwards used on joint account	3,100 00
6. 31 per cent. of rent of houses on Andover street, Boston, torn down for the accommodation of joint business (interest not included in this amount)	5,218 23
7. Balance of accounts during separate operation of the roads ending Dec. 1, 1878, and interest (interest not included in this amount)	49,897 80
8. 31 per cent. of value of gravel furnished to fill Mystic wharf, and interest (interest not included in this amount)	35,000 00
	$352,778 18

Boston & Lowell R. R. Co.'s Claim.

Item No. 9.

In Re NASHUA & LOWELL RAILROAD COMPANY
vs.
BOSTON & LOWELL RAILROAD CO.

Before Elias Merwin, William S. Gardner, and Waldo, Colburn, Referees.

Additional specification of The Boston & Lowell Railroad Co. *vs* The Nashua & Lowell Railroad Co.

The Boston & Lowell Railroad Co. claims the balance due it from the Nashua & Lowell Railroad Co. for terminal charge on freight of the Nashua & Lowell Railroad Co. during the separate operation of said railroads, from Dec. 1, 1878, to Oct. 1, 1880, eight thousand one hundred and forty-four $\frac{7}{100}$ dollars, and interest (thirteen hundred and eighty-four $\frac{49}{100}$ —) from Oct. 1, 1880, to Aug. 1, 1883.

73s

(Signed) THE BOSTON & LOWELL RAILROAD CORPORATION,
By JOHN H. GEORGE, *Its Att'y.*

EXHIBIT F.

Award.

The subscribers, the arbitrators named in the annexed agreement of arbitration, executed by the Nashua and Lowell Railroad Corporation and the Boston and Lowell Railroad Corporation and dated Boston, Sept. 30th, 1882, in pursuance thereof, after due notice, met the parties at Boston on the twenty-third day of February, A. D. 1883, the Nashua and Lowell Railroad Corporation appearing by its counsel, Messrs. E. R. Hoar and F. A. Brooks, Esqs., and the Boston and Lowell Railroad Corporation by its counsel, Messrs. J. H. George and George F. Richardson, Esqs. It was then agreed by the said parties that it was desirable that the arbitrators should first hear, consider, and determine the claims of the Nashua and Lowell Railroad Corporation marked "numbers 3, 4, 5, and 6," in their statement of claims annexed to said agreement entitled Exhibit 1, before entering upon a hearing of any other claims of either party under said submisssion; and with the consent and at the request of both parties the arbitrators, thereupon and upon subsequent days, namely, on the twenty-fourth and twenty-sixth days of February, 1883, proceeded to hear the respective parties in reference to said third, fourth, fifth, and sixth claims of the Nashua and Lowell Railroad Corporation, at each of which hearings the respective counsel aforesaid were present; and, having fully heard and considered the

respective proofs and arguments of the said parties in reference thereto, the subscribers, on the twenty-third day of May, 1883, at Boston, made their final award and determination in respect
73*t* to said claims, and announced the same to the said parties, who were present by their said counsel, in the words following, namely:

"Several of the claims made by the Nashua and Lowell Railroad Corporation against the Boston and Lowell Railroad Corporation were by consent of both parties submitted to the referees for their award and determination, with the understanding and reservation that the remaining claims made by the respective parties were to remain open, either for adjustment by the parties themselves or for future hearing and determination by the referees. The items submitted to the referees and upon which they have been requested to pass are those numbered 3, 4, 5, and 6 in Exhibit 1, annexed to the agreement of reference. The referees have considered these items and are of the opinion, and so award and determine, that the Nashua and Lowell Railroad Corporation is not entitled to recover anything from the Boston and Lowell Railroad Corporation in respect to either of said items."

The hearing of any other claims under said submission was then, by agreement of all parties, adjourned to the twenty-ninth day of June, 1883, at 10 a. m., at Boston.

On said June 29, 1883, the subscribers met the parties in pursuance of the adjournment, the Nashua and Lowell Railroad Corporation appearing by F. A. Brooks, Esq., and the Boston and Lowell Railroad Corporation by Messrs. George and Richardson. The Nashua and Lowell Railroad Corporation then presented the motion, a copy of which is hereto annexed, marked "Exhibit A." Upon consideration thereof said motion was overruled by the subscribers, unanimously as to all of said motion, except so much as related to a rehearing in reference to interest paid or retained in joint account after the vote of directors passed June 25, 1877, and as to that portion by a majority of the arbitrators.

With the consent of both parties the further hearing under said submission was adjourned to the first day of August, 1883, at 10 a. m., at the office of the Boston and Lowell Railroad Corporation, in Boston.

On July 30 and 31, 1883, each of the arbitrators received from the Nashua and Lowell Railroad Corporation papers, copies of which are hereto annexed, marked, respectively, "Exhibits B" and "C."

73*u* On Aug. 1, 1883, the subscribers met the parties according to adjournment, F. A. Brooks, Esq., appearing for the Nashua and Lowell Railroad Corporation and Messrs. George and Richardson for the Boston and Lowell Railroad Corporation. Mr. Brooks then handed to the arbitrators the paper which is annexed, marked "Exhibit D."

The subscribers were of the opinion that they were bound to proceed with the hearing if either party so desired, and so informed the parties, and that they were ready to hear them.

F. A. Brooks, Esq., stated that the Nashua and Lowell Railroad Corporation did not intend to appear further, and did not desire notice of any adjournments, and then withdrew.

The subscribers thereupon proceeded with the hearing.

The Boston and Lowell Railroad Corporation withdrew the following claims in their schedule of claims annexed to the agreement of reference, namely, claims Nos. 1, 2, 6, 7, and 8.

As to claim No. 7, it also appeared that the same had been adjusted and settled between the parties on the twenty-eighth day of July, 1883.

The Boston and Lowell Railroad Corporation introduced evidence in support of claims Nos. 3, 4, and 5.

They also moved to add to their specification of claims the statement of claim marked "No. 9," and in support of this motion introduced evidence tending to prove, and which, in the opinion of the subscribers, did prove, that on the twenty-eighth day of July, 1883, a negotiation took place between F. A. Brooks, Esq., as president of the Nashua and Lowell Railroad Corporation, acting in its behalf, and Charles E. A. Bartlett, treasurer of the Boston and Lowell Railroad Corporation, and acting in its behalf, by which certain claims existing between said parties were settled, as set forth and shown in the exhibit hereto annexed, marked "Exhibit E," and by the terms of which the said claim (No. 9) of the Boston and Lowell Railroad Corporation was excluded from said settlement, and also at the time of said settlement neither the Boston and Lowell Railroad Corporation nor any of its officers or agents had received any notice or information of the vote of the directors of the Nashua and Lowell Railroad Corporation of July 5, 1883, or of any intention
73*v* on the part of said Nashua and Lowell Railroad Corporation to attempt to revoke said agreement of reference or to withdraw therefrom.

The arbitrators allowed said amendment and adjourned the further hearing of the case to Friday, Aug. 3, 1883, 10 a. m., and caused notice of said amendment and of said adjournment to be given to said Nashua and Lowell Railroad Corporation, proof of which service is hereto annexed, marked "Exhibit F."

On Aug. 3, 1883, the hearing proceeded in pursuance of said adjournment, the said counsel of the Boston and Lowell Railroad Corporation alone being present, and evidence was introduced by them in support of said amended item No. 9.

No further claims were presented or testimony offered by either of said parties. No testimony was introduced or offered by the Nashua and Lowell Railroad Corporation in support of any of its claims except the items Nos. 3, 4, 5, and 6, already referred to. No evidence was introduced before us that there were any joint cash or funds in the hands of the treasurer of the Boston and Lowell Railroad Corporation (as stated on claim No. 1 of the Nashua and Lowell Railroad Corporation), but it did appear that the joint cashier of said two corporations held on deposit, in the Boston Safe Deposit and Trust Company, in the name and to the credit of both of said corporations, and subject to be withdrawn only on the joint order

of both of said corporations, the sum of $32,160.32. No claim arises under this submission in reference to said funds, and the award of the subscribers does not embrace or affect the right of either of said parties to said funds.

In reference to the first item in claim 9 of the Nashua and Lowell Railroad Corporation ("for use of its share of the Boston freight houses," etc.), it also appeared that this item was embraced and settled in the settlement aforesaid made between the said parties July 28, 1883.

Summary.

The subscribers having fully heard the respective parties under said submission, so far as they desired to be heard, and having fully considered their respective proofs and arguments, do now, in addition to their final award and determination of May 23, 1883, as hereinbefore set forth, award and determine, and this is our final award and determination in the premises, namely:

73w

(1.) That the Nashua and Lowell Railroad Corporation is not entitled to recover any sum of the Boston and Lowell Railroad Corporation by reason of any of the claims specifically made by it or embraced by said agreement of reference against said Boston and Lowell Railroad Corporation.

(2.) That the Boston and Lowell Railroad Corporation is not entitled to recover any sum of the Nashua and Lowell Railroad Corporation by reason of its items of claim Nos. 1, 2, 6, 7, and 8, the same having been withdrawn by it, and it also appearing that item No. 7 had been settled between the parties July 28, 1883, as hereinbefore fully stated.

(3.) That by reason of its item of claim No. 3 it is entitled to have and recover from the said Nashua and Lowell Railroad Corporation the sum of eleven hundred and thirty-one dollars and fifty cents ($1,131.50) and no more.

That by reason of its item of claim No. 4 it is entitled to have and recover from said Nashua and Lowell Railroad Corporation the sum of twenty-nine hundred and forty-five dollars ($2,945.00) and no more.

That by reason of said amended item of claim No. 9 it is entitled to have and recover from the said Nashua and Lowell Railroad Corporation the sum of eight thousand and seventy-two dollars and thirty-eight cents ($8,072.38) and no more—

Making in all the sum of twelve thousand one hundred and forty-eight dollars and eighty-eight cents ($12,148.88) which the Boston and Lowell Railroad Corporation is entitled to have and recover of the Nashua and Lowell Railroad Corporation.

(4.) That the Boston and Lowell Railroad Corporation is not entitled to recover any sum of said Nashua and Lowell Railroad Corporation by reason of its fifth item of claim, and the same is disallowed; and that, except the sums herein already set forth and allowed, the Boston and Lowell Railroad Corporation is not entitled to recover any sum of the Nashua and Lowell Railroad Corporation

by reason of any of the claims specifically made by it or em-
73x braced within said agreement of reference against said Nashua and Lowell Railroad Corporation.

(5.) That the charges of the arbitrators, taxed at the sum of thirteen hundred dollars, be paid by the Boston and Lowell Railroad Corporation, and that upon payment thereof it have and recover of the Nashua and Lowell Railroad Corporation one-half of said amount, namely, $650, in addition to the sum of $12,148.88, hereinbefore awarded to the said Boston and Lowell Railroad Corporation.

Boston, Aug. 7, 1883.

ELIAS MERWIN.
WALDO COLBURN.
WILLIAM S. GARDNER.

EXHIBIT A.

In the Matter of the Submission of Claims Between THE NASHUA & LOWELL R. R. CORPORATION and THE BOSTON & LOWELL R. R. CORPORATION, Pending before Elias Merwin, Waldo Colburn, Wm. S. Gardner, as Referees.

Your petitioner, The Nashua & Lowell R. R. Co., respectfully shows to the referees that it was heard in the latter part of February last in regard to its claims against the Boston & Lowell R. R. Co., including claim numbered 5 in the schedule of claims annexed to the submission; that it appeared in evidence and was not disputed that during the twenty years' joint-traffic contract the sum in all of $95,730.35 was taken out of the receipts of both of said roads under said contract and paid over by the manager to the Boston & Lowell R. R. Co. for its own use and benefit as and for interest, reckoned at 7 per cent. per annum, upon the cost to said Boston & Lowell Railroad Co. of shares owned by that company in the capital stock of the Salem & Lowell and Lowell & Lawrence railroads, of which amount 31 per cent., or $29,676.38, belonged wholly to the Nashua & Lowell R. R. Co. as its share or quota of the net earnings of the two roads under said traffic contract; that the B. & L. R. R. Co., not denying such to be the fact, insisted that the N. & L. R. R. Co. was not
73y entitled to a restitution of said sum of $29,676.38 or any part thereof, giving as its reason therefor that said N. & L. R. R. Co. had become estopped or barred in law from enforcing such claim; and said B. & L. R. R. Co., in support of its position that such claim could not be sustained, offered in evidence a vote passed July 23, 1872, purporting to be a vote of the directors of the N. & L. R. R. Co., and no other evidence having reference to said claim and in opposition thereto was offered, so far as your petitioner is aware.

And your petitioner is unable to recollect that any other substantive fact was put in evidence or relied on by said B. & L. R. R. Co. to sustain its position that the N. & L. R. R. Co. had become estopped or legally barred from recovering or claiming to recover the said sum of $29,676.38, above mentioned.

And your petitioner shows that there is nothing whatever con-

tained in the vote of July 23, 1872, which relates or purports to relate to the said sum of $29,676.38; yet your petitioner was informed by the referees on the — day of May last that, in their judgment, it was not entitled to recover back said sum of $29,676.38 or any part thereof, meaning (as is supposed by your petitioner) that it had become estopped or cut off by some act of its directors (of which act your petitioner is ignorant) from successfully asserting its said claim; and if the referees were brought to their conclusion on this subject by any other or different considerations, then your petitioner is wholly ignorant what such considerations may be.

And your petitioner shows the facts in regard to the sum of $29,676.38 mentioned in its said fifth specification of claim are as follows:

During the year 1871, at a special meeting of the stockholders of the Boston & Lowell R. R. Co., while the Lowell & Lawrence and Salem & Lowell railroads were under lease to the Boston & Lowell R. R. Co. and were being operated at a rental under the joint-traffic contract, it was voted that "trustees in behalf of the (B. & L.) corporation are hereby authorized to purchase and hold any part not less than a majority of the stock of said connecting railroads."

(Records B. & L. meeting, Aug. 7, 1871, p. 36.)

73z Thereupon the B. & L. R. R. Co., through trustees appointed for that purpose, acquired by purchase a majority of the capital stock of the Lowell & Lawrence and Salem & Lowell roads at a total cost of $345,674, but continued to operate said roads on joint account under said contract as before.

After this purchase the Nash. & L. R. R. Co. was charged by the Boston & Lowell R. R. Co. with 31 per cent. of the interest on the cost of these shares, and the amount in all so taken from the proper funds of the N. & L. R. R. Co. and paid over by the manager to the B. & L. R. R. Co. Dec. 1, 1878, without interest, was $29,676.38.

And your petitioner shows that the directors of the N. & L. R. R. Co. as such never acted upon the subject of a contribution of any sum toward the payment to the B. & L. R. R. Co. as and for interest upon the cost of its Salem & Lowell and Lowell & Lawrence railroad shares, and that, so far as appeared in evidence, this matter never came before your petitioner's directors at any time.

II.

And your petitioner further shows that it presented to the referees at said hearing another claim of large amount, being the same numbered 6 (six) in the schedule annexed to said submission, and proved to the referees that during said twenty years' contract and before December 1, 1878, the sum in all of $603,884.37 (and perhaps $6,002.66 more) was taken out of the earnings of receipts of the two roads arising under said joint-traffic contract, then being in the hands of the manager, and paid over to the B. & L. R. R. Co. for its own use and benefit, in pursuance of the terms of the vote of July 23, 1872, above mentioned, and for the purposes in said vote set forth, of which amount 31 per cent., or $187,204.15, belonged wholly

to your petitioner, according to the terms of said twenty years' contract, as originally made and administered, down to July, 1872, as its share of the net earnings arising or accruing under said contract.

And your petitioner shows that said B. & L. R. R. Co. re-
74 sisted the recovery by your petitioner of said last-named sum or any part thereof on the same grounds hereinabove stated to have been taken and urged by it in defence to your petitioner's fifth claim.

It is conceded by your petitioner that the matter of its sixth claim is referred to and embraced in the directors' vote of July 23, 1872, and that this vote, if valid and binding upon your petitioner, would constitute a good and complete answer to said sixth claim, or to so much thereof as arose or accrued while that vote remained in force and operative.

Your petitioner, however, put in evidence another vote of its directors, passed June 25, 1877, intended to defeat or rescind and determine the former vote of July, 1872 (if the same ever possessed any legal validity or force), and thereupon your petitioner contended that its right to recover back so much of the amount specified in the sixth claim as went into the hands of the B. & L. R. R Co. after the vote of June 25, 1877, was not or could not be lawfully barred or cut off by anything contained in the directors' first vote of July, 1872; and it appeared in evidence that $52,000 of this sum or thereabouts had gone into the hands of the B. & L. R. R. Co. under said vote of July, 1872, after the attempted repeal or reversal of the vote of July, 1872, by the vote of June, 1877.

The referees have found adversely to this entire sixth claim without any discrimination (as we understand) between the sums paid over to B. & L. R. R. Co. by the manager after the vote of June, 1877, and those paid over to it before the time of that vote.

Your petitioner, feeling aggrieved by these rulings of the referees in matters of law, is not willing to accept the same as correct or final, and does not consider itself bound to do so, inasmuch as the submission contains the special provision that the referees should be governed in their determination and award by the rules of law applicable to the case.

Your petitioner therefore respectfully prays the referees that they will grant a rehearing as to the law involved in the fifth claim and in so much of the sixth claim as has arisen or accrued since the vote of directors passed June 25, 1877; and if upon such rehearing the views of the referees in said matters of law shall be unchanged, then

your petitioner prays that they will make in writing such a
74a report of the facts found by them and of their rulings upon the legal questions raised by your petitioner as will enable your petitioner to save and not to lose the benefit of the provision in said submission which requires said referees to be governed by the rules of law applicable to the case.

(Signed) NASHUA & LOWELL RAILROAD CORPORATION,
By its attorney, F. A. BROOKS.

EXHIBIT B.

(Copy.)

At a meeting of the directors of the Nashua & Lowell Railroad Corporation, holden at Boston July 5th, 1883, it was—

Voted, Whereas the Nashua & Lowell Railroad Corporation did, on the — day of —— last, enter into a certain submission with the Boston & Lowell Railroad Corporation whereby certain specified claims or demands of each party against the other were left to the determination of E. Merwin, Waldo Colburn, and William S. Gardner, Esquires, it being specially provided in such submission that the referees should be governed in their determination and award by the rules of law applicable to the case; and whereas said provision or clause was inserted in said submission by the Nashua & Lowell Railroad Company with the intention and expectation that it would thereby be enabled to avoid or set aside any award which should not be made in conformity with the principles or rules of law; and whereas it was supposed by the counsel for the Nashua & Lowell Railroad Corporation that the referees would, at the request of either party dissatisfied with their findings in matters of law, be willing to disclose the legal grounds upon which they had acted, without a knowledge of which the clause of the submission above named would be without any practical force or effect as a limitation of the powers of the referees, and said referees, after hearing the Nashua & Lowell Railroad Corporation as to its principal claims, had rejected several of them to the amount of $80,000 upon
74*b* some supposed ground of law understood to be in the nature of estoppel *in pais*, although the counsel of the Nashua & Lowell Railroad Corporation is advised and believes that said $80,000 of claims are not properly subject to the defence of estoppel and would not be held to be so by any court of final resort;

And whereas the Nashua & Lowell Railroad Corporation has applied to said referees with a request in writing that they would either revise their conclusions as to said claims or else would make such a report of the facts of the case and of their rulings in matters of law thereon as would enable it to contest the accuracy of such legal rulings;

And whereas this application has been refused by the referees, so that the Nashua & Lowell Railroad Corporation cannot have the benefit expected by it of the clause in said submission relative to the rules of law being made the basis of any decision;

And whereas the counsel for the Boston & Lowell Railroad Corporation before said referees has not ceased to vilify and abuse the officers and managers of the Nashua & Lowell Railroad Corporation and to treat them with great indignity:

Now, therefore, resolved, under the circumstances above set forth, That this corporation will revoke said submission and refuse to proceed further under the same unless the referees will either make a special report of their findings of fact and rulings of law in relation

to the 5th claim and that portion of the 6th arising after May, 1877, or else unless this corporation shall be permitted to amend the said submission by striking out or withdrawing therefrom the said 5th claim and that portion of the 6th claim which has accrued or arisen since the vote of June 25, 1877.

Voted, That the clerk send a copy of the foregoing resolution to the Boston & Lowell Railroad Corporation and also to the referees.

A true extract from the record.

Attest: (Signed) W. W. BAILEY, *Clerk.*

74c EXHIBIT C.

(Copy.)

Whereas the Nashua & Lowell Railroad Corporation brought its bill in equity in the United States circuit court for the district of Massachusetts against the Boston & Lowell Railroad Corporation and others, in April, 1880, and the defendants therein resisted the same by pleading to the jurisdiction of said court, and their said plea was duly heard and overruled, and they were ordered to answer the said bill by a day certain (January 1, 1881), and they neglected or refused to do so, but instead thereof filed their demurrer to said bill, setting forth the same grounds of defence which had once been pleaded by them as above and overruled, and the plaintiffs then filed their motion to the court in said suit that the bill of complaint be taken "*pro confesso*" for want of answer, as ordered by said court.

And the Boston & Lowell Railroad Corporation having proposed that the demands in said suit be referred to arbitration, the plaintiffs in said suit consented thereto, if the arbitration were made under a rule of court in said cause. It was, however, insisted upon by said Boston & Lowell Railroad Corporation, when the papers of submission came to be drawn, not only that claims in its favor against the Nashua & Lowell Railroad Corporation should be submitted to the same arbitrators at the same time, but that all the claims of each party against the other should be embraced in one and the same instrument of submission, so as to be made the subject of a single award.

And it not being possible that such a submission should be made a rule of court in the cause above named, the Nashua & Lowell Railroad Corporation, on the 30th September, 1882, concluded to become, and did become, a party to such submission, embracing in one instrument the claims of both parties, but did so upon the understanding, distinctly expressed in said instrument of submission, that the arbitrators therein named, viz., Elias Merwin, Wil-
74d & e liam S. Gardner, and Waldo Colburn, "shall be governed in their determination and award by the rules of law applicable to the case."

And it was the confident expectation and belief of the Nashua & Lowell Railroad Corporation at the time that the language so inserted in the submission would bind the arbitrators not only to con-

form their decision in all respects to the law as understood by them, but also to such rules of law as would command the sanction and approval of the courts of law having jurisdiction of the parties and subject-matter (if either party should see fit to question the accuracy of the legal conclusions adopted by the arbitrators in any respect), and that it would be the rightful privilege of either party to such submission to know and understand what was the legal basis upon which the arbitrators had proceeded in reaching any determination arrived at by them.

And whereas the arbitrators proceeded under said submission and heard the parties from time to time until the 29th day of June last, when it appeared from the communications of the arbitrators themselves that, in their judgment, the only force and effect of the clause of the submission above quoted was to require them to conform their award to their own understanding of the law and the evidence, and that the parties to the submission were not even entitled to know the legal grounds upon which their findings might be based, and would not be informed by them concerning such legal grounds, although expressly requested so to do;

And whereas it seemed obvious to the directors of the Nashua & Lowell Railroad Corporation that if the arbitrators were correct in their construction of the submission, the submission was not such a one as they had intended to enter into, and that if the arbitrators were wrong in such construction and yet refused to disclose the legal grounds of their findings, the corporation would be wholly unable to obtain a correction of any legal error or mistake, or even to get into the courts of law for that purpose, and that the directors ought not under these circumstances to acquiesce in the position so taken by the arbitrators under said submission, and they determined not to do so by vote, duly passed July 5th, 1883:

Now, therefore, the Nashua & Lowell Railroad Corporation, in pursuance of said vote, does hereby revoke the said submis-
74*f* sion and all the authority therein and thereby conferred upon Elias Merwin, William S. Gardner, and Waldo Colburn, as arbitrators named therein, and does hereby terminate, so far as it lawfully may, any and all power heretofore given them to act under the said submission.

This course is, however, taken by said corporation only after it has adjusted and paid the Boston & Lowell Railroad Corporation all sums believed to be due to them and recoverable under said submission, and after overtures made to the Boston & Lowell Railroad Corporation by us to continue bound by said submission, provided that as to a fraction only of our claims embraced in the submission we can have an unquestioned right to a strictly judicial determination.

These overtures made by us to the Boston & Lowell Railroad Corporation have been declined. In undertaking, as we now do, to end the submission we mean no disrespect to the arbitrators, much less to complain or find any fault with them.

It is our misfortune to have entered into a submission which, in

the judgment of the arbitrators, does not afford us any right to or any means for testing the legal accuracy of decisions made under it.

As no such result was ever intended by us, and as we have never confided to the arbitrators the interpretation of the submission itself, in this respect we cannot now consent to do so.

The Nashua & Lowell Railroad Corporation is willing to assume and pay all the expenses and charges of the referees to this date, and hereby offers to do so on being informed by them of the amount.

The arbitrators are requested to let us know what it is.

Boston, July 30, 1883.

(Signed) THE NASHUA & LOWELL RAILROAD CORPORATION,
By F. A. BROOKS, *Its Att'y & President.*

74*g* EXHIBIT D.

At a meeting of the directors of the Nashua & Lowell railroad held at Boston, August 9, 1883, at 9 o'clock in the forenoon.

The president having laid before the board a copy of an instrument of revocation of the submission entered into on the 30th day of September last between this company and the Boston & Lowell R. R. Co., said submission being executed by him in behalf of this company in pursuance of the directors' vote of July 5th last—

It was voted that the course so taken by him be ratified and approved, and that the directors will treat the said submission as no longer in force.

A true extract from the record.

Attest: (Signed) W. W. BAILEY, *Clerk.*

EXHIBIT E.

Nashua and Lowell R. R. in acc't.

DR.

1880.			
Oct. 1.	To monthly balances since Dec. 1, 1878, 22 months to date, after deducting $14,009.24 paid over to Fitchburg R. R. by N. & L. Cor. for B. & L. Cor.	34,400	89
	To amount of mail service collected by N. & L. Cor. of U. S. P. O. Department for three months ending Dec. 31, 1880	1,487	67
		35,888	56
	Deduct for charges made by N. & L. Cor. for switching done at Lowell, reduced by compromise to	3,914	43
		31,974	13

74*h* 1880.

Oct. 1.	To balance on above acc't	19,405 66
	" int. on same for three years from Oct. 1, 1883	3,493 02
		22,898 68

1880. Cr.

Oct. 1.	By amount of mail money collected by B. & L. R. R. of U. S. P. O. Department, not accounted for to N. & L. Cor.	1,630 34
	" proportion of Framingham & Lowell R. R. rental paid for use Middlesex-St. station, 22 mos.	2,200 00
	" rent of freight-house in Boston (31%), at 5% on cost ($95,325), 22 mos.	8,738 13
	" balance due B. & L. R. R. Cor. on above	19,405 66
		31,974 13

1883.

July 24. Received of the Nashua & Lowell R. R. Corporation its note for $22,898.68, payable Oct. 1., 1883, in payment of the above account, but without prejudice to the claim of the B & L. R. R. Corporation for terminal charges in its favor against the Nashua & Lowell R. R. Cor. at Boston and Mystic, no charges being embraced in the above account.

Boston, July 28th, 1883.

Settled as above.

(Signed) C. E. A. BARTLETT,
Treas, Boston & Lowell R. R. Corp.

74*i* EXHIBIT F.

In Re NASHUA & LOWELL RAILROAD CO. & THE BOSTON & LOWELL RAILROAD CO., before Elias Merwin, William S. Gardner, and Waldo Colburn, Referees.

BOSTON, *Aug.* 1*st*, 1883.

To the Nashua & Lowell Railroad Co. and F. A. Brooks, its president and att'y.

DEAR SIR: The Boston & Lowell Railroad Co. have filed an additional specification of claim against said Nashua & Lowell Railroad Co. under the agreement of arbitration, a copy of which is hereto annexed.

The further hearing of the case, including said claim, is adjourned to Friday, the 3d inst., at ten o'clock a. m., at the directors' rooms of the Boston & Lowell Railroad Co., in the city of Boston, at which time and place you are notified to be present.

By order of the referees.

(Signed) ELIAS MERWIN, *Chairman.*

Additional Claim of the Boston & Lowell Railroad Co. against the Nashua & Lowell Railroad Co., Referred to in the Foregoing Notice.

The Boston & Lowell Railroad Co. claim against the Nashua & Lowell Railroad Co. the following:

Copy of Original Filed This Day with the Arbitrator.

In Re NASHUA & LOWELL RAILROAD COMPANY and BOSTON & LOWELL RAILROAD Co., before Elias Merwin, Wm. S. Gardner, and Waldo Colburn, Referees.

Additional Specification of The Boston & Lowell Railroad Co. v. The Nashua & Lowell Railroad Co.

The Boston & Lowell Railroad Co. claim the balance due it from the Nashua & Lowell Railroad Co. for terminal charge on freight of the Nashua & Lowell R. R. Co. during the separate operation
74*j* of said railroads, from Dec. 1, 1878, to Oct. 1, 1880, eight thousand one hundred and forty-four $\frac{7}{100}$, and interest (thirteen hundred and eight-four $\frac{49}{100}$ dollars) from Oct. 1, 1880, to Aug. 1, 1883.

BOSTON & LOWELL R. R. CORP.,
By JOHN H. GEORGE, *Its Attorney.*

SUFFOLK, *ss:*

BOSTON, *Aug.* 1, 1883.

I this day gave in hand the original of which the within is a true copy to the within-named F. A. Brooks, Esq.

(Signed) BENJ. F. BAYLEY,
Dep'y Sheriff.

Service & travels	58
Time & trouble	1 00
	1 58

On the twenty-fourth day of June, A. D. 1884, the following replication to answer of C. E. A. Bartlett was filed:

Replication. (*Filed June* 24, 1884.)

The replication of complainant to the answer of Charles E. A. Bartlett, defendant.

This repliant says it will aver and prove its bill of complaint to be true, certain, and sufficient in law, and that the answer of said defendant Bartlett is uncertain, untrue, and insufficient to be replied to by the repliant, without this, etc., etc.

By its solicitor, F. A. BROOKS.

74*k* On the fourth day of October, A. D. 1884, the following additional answer of Boston and Lowell Railroad Corporation was filed:

Additional Answer of Boston and Lowell Railroad Corporation. (*Filed Oct.* 4, 1884.)

And now comes the defendant and, by request and consent of the plaintiff, makes this additional answer to the plaintiff's bill of complaint, as follows, viz:

Upon its information and belief, this defendant denies that said vote of July 23, 1872, was not passed by the plaintiff's board of directors acting separately from the board of directors of the defendant.

It admits that the two boards of directors usually met together and were presided over by one person, who was the president of each corporation; that said two boards usually acted together upon questions coming before them in reference to the ordinary business and management of the two corporations and growing out of operating the roads of the two corporations under the joint con-
741 tract; but, upon its information and belief, it alleges that each of said boards at said meetings had a clerk present, and that all votes upon questions affecting or bearing upon the interests of either corporation and not provided for and arising out of the said joint contract were always voted upon by each board of directors separately, and that the directors of one corporation never voted upon such questions with the directors of the other corporation, although the directors of both corporations were present when such votes were passed.

The defendant denies, upon its information and belief, that said vote of July 23, 1872, was by votes of directors of the defendant corporation, or by persons not directors of the plaintiff corporation; but, on the contrary, it alleges, on its information and belief, that said vote was passed by the plaintiff's directors, and that no persons other than the plaintiff's directors voted upon it.

The defendant, upon its information and belief, cannot admit that said vote of July 23, 1872, was proposed by J. G. Abbott, a director of the defendant corporation, but requires the plaintiff to prove the same if it is deemed material.

The defendant admits that said J. G. Abbott was at no time a director of the plaintiff; it admits that said Abbott was a director of the defendant at the time said vote was passed, and that he was present at the meeting of the directors of the defendant, and the meeting of the directors of the plaintiff, sitting together and presided over by one person, who was president of each corporation, at the time when said vote was passed by the directors of the plaintiff, and it admits that said two boards of directors were sitting together as aforesaid and presided over as aforesaid; but, upon its information and belief, it denies that said vote was put before said meeting of said two boards of directors sitting together jointly as one board, and that it was put before said two boards at one and the same time, as if to one board of directors and not separately to two boards; but, upon its information and belief, the defendant alleges that said

vote was put separately to each of said two boards and was acted upon separately by each of said two boards.

The defendant admits that said vote was drawn up by said Abbott, and it alleges that it was drawn up by him as the report of a
74*m* committee appointed by both the directors of the plaintiff and the directors of the defendant.

The defendant says, upon its information and belief, that all the directors of the plaintiff present at the meeting when said vote was passed and being a quorum of the said directors voted for said vote, but has no knowledge or belief at this time of the names of such directors.

The defendant has no information upon which it can found a belief upon the question whether the meeting at which said vote was passed was held at Young's Hotel, and therefore requires the plaintiff to prove its allegation in that behalf if it is deemed material.

THE BOSTON AND LOWELL RAILROAD CORPORATION,
By C. E. A. BARTLETT, *Treasurer.*

On the same fourth day of October, A. D. 1884, the following replication to answers of Boston and Lowell Railroad Corporation was filed:

Replication. (*Filed Oct.* 4, 1884.)

The replication of the complainant to the answers of The Boston and Lowell Railroad Corporation, defendant.

This repliant, for replication to the said answers, saith that it will aver and prove its said bill to be true, certain, and sufficient in law to be answered unto, and that said answers of said defendant are untrue and insufficient to be replied unto by this repliant, without this, that any other matter whatsoever in the said answers contained material to be replied unto, confessed, traversed, or denied, is true.

By its solicitor, F. A. BROOKS.

74*n* This cause was thence continued from term to term to the May term, A. D. 1885, when, on the twenty-second day of September, the following motion was filed:

Motion to Amend Bill. (*Filed Sept.* 22, 1885.)

And now comes the complainant and moves the court for leave to amend its bill of complaint by striking out so much thereof as relates to a claim for the difference in value between 300 tons of new rails and 300 tons of old rails at the termination of the traffic contract, meaning by striking out the nine lines nearest the bottom of the third page of the bill as printed for the court in this case.

By its solicitor, F. A. BROOKS.

On the twenty-third day of September the foregoing motion to amend bill was denied by the court.

On the twenty-fourth day of September, A. D. 1885, the following disclaimer was filed:

Disclaimer and Discontinuance as to Demand for Value of 300 *Tons Rails.* (*Filed Sept.* 24, 1885.)

And now the complainant, after having filed its motion to amend its bill of complaint by striking out so much thereof as relates to a claim for the value of 300 tons of new rails in place of old, as set forth in the last 9 lines next the bottom of page 3 of the printed bill, and said motion to amend having been heard by the court and refused, comes and enters its disclaimer as to the said claim for
74*o* the value of 300 tons of new rails, &c., in excess of the value of a like amount of old rails at the end of the contract and discontinues its bill of complaint as to so much of said bill as relates to the value or claim of recovery for the value of said 300 tons of new rails and admits that the matter of said claim is not the proper subject of a suit in equity and is only recoverable in a suit at law.

By its solicitor, F. A. BROOKS.

This cause was thence continued to the present, October, term, A. D. 1885, when, publication of the testimony having passed in the clerk's office, the cause is set down for hearing and fully heard by the court.

On the fifth day of May, A. D. 1886, the opinion of the court is filed and the following decree is entered:

Final Decree.

(May 5, 1886.)

COLT, *J.:*

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the bill be dismissed with costs, taxed at ——.

By the court:

JOHN G. STETSON, *Clerk.*

From this decree the complainant in open court claims an appeal to the Supreme Court of the United States and gives good and sufficient security to answer all damages and costs if it fails to make its plea good, and said appeal is allowed.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

74*p* The following is the evidence used at the hearing of said cause before said circuit court:

Evidence for Complainants.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me, John G. Stetson, examiner.

BOSTON, *Nov.* 5, 1882.

Present: Francis A. Brooks, Esq., of counsel for complainants; Josiah G. Abbott, Esq., of counsel for Boston and Lowell Railroad Corporation and Charles E. A. Bartlett, defendants; S. A. B. Abbott, Esq., for executors of Hocum Hosford, defendants.

The complainants offer in evidence the following documents, subject to objections as to competency, all other objections being waived:

1. Supplemental compact of Oct. 1, 1858, marked "Exhibit 1, J. G. S., ex'r."

2. Acts of New Hampshire Legislature of 1835 and 1838 relating to Nashua & Lowell Railroad Corporation, marked "Exhibit 2, J. G. S., ex'r."

75 3. By-laws of Nashua & Lowell Railroad Corporation, marked "Exhibit 3, J. G. S., ex'r."

4. Copy of record of meeting of directors of Nashua & Lowell Railroad Corporation, held July 23, 1872, marked "Exhibit 4, J. G. S., ex'r."

5. Annual report of directors of Boston & Lowell Railroad Corporation for year 1874, marked "Exhibit 5, J. G. S., ex'r."

Attest: JOHN G. STETSON, *Examiner.*

EXHIBIT 1. J. G. S., Ex'r.

Supplemental Contract.

On this first day of October, A. D. one thousand eight hundred and fifty-eight, the Boston & Lowell Railroad Corporation and the Nashua & Lowell Railroad Corporation, parties to the within contract, made between the said corporations on the twenty-ninth day of January, A. D. 1857, for the joint operation of their roads and branches, do hereby agree, through their respective directors, authorized thereto by votes of said corporations passed at special meetings, held by the Boston & Lowell R. R. Co. on the 14th day of Sept., 1858, and by the Nashua & Lowell R. R. Co. on the 22nd day of Sept., 1858, to extend and continue the said contract in all of its terms and provisions, except as hereinafter provided, for a term of twenty years from the date hereof: Provided, That the following additional articles shall form a part and parcel of the agreement and have binding force from and after this date:

Article 1. The contracts this day executed between the Boston & Lowell and the Salem & Lowell and Lowell & Lawrence Railroad Companies for the management and control of the said Salem & Lowell and Lowell & Lawrence railroads shall be assumed by the parties hereto on joint account, and any profit or loss arising from

the same shall be divided between these parties in the same proportions as is provided in the original contract for the division of the net income; but if from any cause the said contract with the Salem & Lowell and Lowell & Lawrence roads shall be terminated within the period of twenty years aforesaid, then this agree-
76 ment and contract for the joint operation of said Boston & Lowell and Nashua & Lowell roads and branches may also be made void at the pleasure of either party on three months' written notice to the other.

Art. 2. The contracts now existing between the Nashua & Lowell Railroad Corporation and the Stony Brook and Wilton Railroad Corporations, now embraced in and forming a part of this original contract, may be renewed during the continuance of this agreement at the pleasure of the Nashua & Lowell Railroad Co. either on the present terms or on any other terms not less remunerative to said Nashua & Lowell Railroad Co., which these parties shall mutually agree upon at the time of such renewal.

Art. 3. The contract now existing between the Nashua & Lowell Railroad Co. and the Northern Railroad Co., dated the twenty-seventh day of October, 1857, and providing for the adjustment of the business of the Vermont Central and Ogdensburg roads for a long period of years, but suspended in its operation until the first day of April, 1860, through the intervention of a contract between these parties and the said Northern railroad, dated the first day of December, 1857, shall, from and after said first day of April, 1860, be assumed by these parties on joint account so long as this contract shall be in force.

In witness whereof the parties have hereunto subscribed and caused the seals of said corporation to be affixed the day and year first above written.

J. G ABBOTT,
ISAAC HINCKLEY,
Committee on part of Boston & Lowell R. R. Co.

In presence of—
T. P. TENNEY,
To J. G. A. and I. H.

ONSLOW STEARNS,
DANIEL S. RICHARDSON,
Committee on part of Nashua & Lowell R. R. Co.

GEO. STARK,
To O. S. and D. S. R.

77 * * * * * * *

EXHIBIT 3. J. G. S., Ex'r.

By-Laws of Nashua and Lowell Railroad Corporation.

SECTION 1.

Officers and their duties.

Article 1. The officers of the corporation shall consist of a board of directors, not less than five nor more than seven in number, as the corporation shall decide at the annual meeting at which they shall be elected—a majority of whom shall constitute a quorum for the transaction of business—a clerk and treasurer, all of whom shall be stockholders, and shall be chosen by ballot, to continue in office one year and until others are chosen to fill their places.

Article 2. The directors shall choose one of their own number to be president, who shall also be president of the corporation, and shall preside at all meetings of the directors and stockholders. In case of his necessary absence a president *pro tem.* may be chosen to supply his place.

Article 3. Any vacancy occurring, from whatever cause, shall be filled by the directors until the next annual meeting.

Article 4. The compensation of the clerk and treasurer shall be fixed by the directors.

Article 5. It shall be the duty of the directors to superintend the prudential concerns of the corporation; to order instalments and fix on the time and mode of payment; to hire such agents and to make such contracts as may be necessary for the completion of the railroad, and to exercise all other powers incident to directors of corporations of a similar nature. It shall also be their duty to call meetings of the corporation when duly required; to make reports of their acts and doings, receipts, and expenditures to the Legislatures of New Hampshire and Massachusetts agreeably to their
78 respective charters, and to make a report at each annual meeting, and oftener if required duly by the stockholders, of their management and proceedings and of the situation and affairs of the corporation. They shall also appoint a directors' clerk, who shall be sworn to the faithful discharge of his duties, who shall keep a fair record of all their proceedings and note the names of all the directors present at each meeting.

Article 6. The treasurer shall give bond, in such sums as the directors may order and with such sureties as they may approve, faithfully to account for all monies received by him in his said capacity and to perform all other duties incumbent upon him. It shall be his duty to collect all instalments ordered by the directors; to receive and safely keep all monies, notes, obligations, and other papers or property belonging to the corporation, and to disburse or deliver over the same as required by the directors; to keep a book or book of accounts in an approved form showing the true state of the finances and funds of the corporation, and also a book

showing the names of the stockholders and the amount of stock owned by each, with all transfers thereof. He shall exhibit at each annual meeting, and whenever required by the directors and corporation, a just account of the receipts and expenditures of the corporation and of the condition of his department, and shall prepare for the directors in season, to lay before the Legislatures of New Hampshire and Massachusetts, such statement as their respective charters may require. He shall keep the seal of the corporation and affix it to all such contracts and instruments made by the corporation as the directors may order. He shall sell and convey all shares on which the instalments shall not be duly paid in the mode hereinafter prescribed and perform all other duties imposed upon him by the corporation.

Article 7. It shall be the duty of the clerk, who shall be sworn to the faithful performance thereof, to keep a full and accurate record of the votes and acts of the corporation and to call meetings as hereinafter directed and to perform all other duties incumbent on him in his said capacity.

Section II.

Meetings.

Article 1. There shall be an annual meeting of the corporation on the last Wednesday of May in every year at such time and place in Nashua village as the directors may appoint, at which meeting all officers shall be chosen.

Article 2. Special meetings may be called by the directors whenever, in their opinion, it may be necessary by publishing a notice of the time and place thereof, signed by the clerk, in the newspapers printed in Nashua and in one or more papers printed in the city of Boston seven days at least prior to said meeting.

79 & 80 Article 3. Special meetings shall be called at any time by the directors, on the application, in writing and signed, of stockholders owning five hundred shares of the capital stock, by giving a like notice.

Article 4. In case of the neglect or refusal of the directors to call said meeting when duly required it shall be the duty of the clerk to call the same, and, in case of his neglect or refusal, of the treasurer.

Article 5. At all annual meetings or any adjournment thereof it shall be in order to act upon any business coming within the purview of their acts of incorporation. At all special meetings the subject shall be designated in the notice.

Article 6. Absent members may vote by proxy, duly authorized in writing, which authority shall be filed by the clerk.

* * * * * * *

81 SECTION V.

Amendments.

Article 1. These by-laws shall be binding on the corporation until altered or repealed by the votes of three-fourths of the whole number of shares.

EXHIBIT 4. J. G. S., Ex'r.

BOSTON, *July* 23*rd*, 1872.

At a meeting of the directors of the Nashua & Lowell Railroad Co., held at the manager's office, in Boston, on Tuesday, the 23rd day of July, 1872, Messrs. Crowninshield, Richardson, and Sigourney were present.

The monthly statement was presented and read.

The manager reported that a discrepancy existed between the records of the Boston & Lowell and of the Nashua & Lowell roads as to the committee authorized to sign the contract of the Middlesex Central railroad, and it was

Voted to amend the records of this board of May 28. 1872, by substituting the name of Edward Spalding in place of the name of Henry Sigourney on the committee for executing the Middlesex Central railroad contract.

A communication from Gen'l B. F. Butler, pres. of the Wamesit Power Co. of Lowell, with a proposed contract relative to the right of way and maintenance of the branch track extending beyond the Lowell bleachery, was referred to Messrs. Daniel S. Richardson and Hocum Hosford, with full powers.

The meeting was then adjourned to Young's Hotel.

At 2 o'clock p. m. on the above-named date the directors met, according to adjournment, at Young's Hotel, in Boston. Messrs. Crowninshield, Stearns, Richardson, and Sigourney were present.

Judge Abbott, of the Boston & Lowell board, presented the subject of expenditures made and being made by the several companies for improvements, and it was

Voted, That the expenditures made and to be made by the Boston & Lowell R. R. Co. for land and building in Boston for a new
82 station and the expenditures made and to be made by said corporation for the building and completing the Mystic River railroad and for the improvements in Winchester for a new station and land for railway purposes, to the amount of $20,000, are to be treated in the management of the business under the joint business contract existing between said corporation and the Nashua & Lowell R. R. Co. as follows, viz: The said Boston & Lowell R. R. Co. are to be paid the interest upon such expenditures made and to be made at the rate of seven per cent. per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract, and the cashier of said two

corporations and treasurer of the Boston & Lowell R R. Co. is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston and Lowell R. R. Co. out of the joint receipts of said two corporations. Also

Voted, That until a different agreement is made between the Boston & Lowell and the Nashua & Lowell R. R. Corporations that the use and rents of about 133,000 square feet of land in Lowell, between the Northern avenue and the Pawtucket canal, and of the flour store and lot of land on Thorndike street near Dutton street, in Lowell, belonging to the Nashua & Lowell R. R. Co., and of about 200,000 feet of land in East Cambridge, filled in since the year 1858, belonging to the Boston & Lowell R. R. Co., shall belong to the corporations under their joint business contract, without further allowance therefor to either corporation, provided, however, it is not by this arrangement intended to express any opinion as to the actual or relative value of said parcels of land.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

* * * * * * *

83 *Deposition of George Stark.*

Direct examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

BOSTON, *Nov.* 5, 1884.

Int. 1. What is your name, age, and residence, and how were you occupied or employed from January, 1857, to 1875, and what experience have you had in the operation and management of railroads?

Ans. George Stark; sixty-one; Nashua, N. H. From 1857 to 1875, I couldn't give the exact months, I was the managing agent of the Boston and Lowell and Nashua and Lowell railroads. I have been engaged from 1850 to 1857 in the operation of different railroads in New Hampshire, Massachusetts, and New York, and from 1875 to 1879 I was engaged in the management of the Northern Pacific railroad.

Int. 2. Whether or not you were made the joint agent or manager of the Boston and Lowell and the Nashua and Lowell railroads under the contract between the two corporations referred to and made part of the bill of complaint in this case, dated Jan. 29, 1857, and afterwards extended for twenty years from Oct. 1, 1858, a copy of which is now shown you.

Ans. I was.

Int. 3. Whether or not as such joint agent you came into the possession or receipt of the earnings of the two railroads under said contract and had the general charge and custody of the said earnings and the disbursement thereof, either directly or through some subordinate employed for the purpose and called a cashier.

Ans. During that period I was in charge of the affairs of those companies and controlled the earnings and disbursements through other officers. No money came into my hands. There was an officer called a cashier.

Int. 4. Whether or not as joint agent or manager you had charge of the cash receipts or payments under the joint-traffic contract and of the making up of the accounts and the division of the net earnings between the parties to said contract—that is, whether or not such accounts were kept and such division made under your authority or direction as such joint agent or manager. If not, how otherwise?

84 Ans. They were so kept.

Int. 5. Whether or not you, as manager of the railroads under this contract, had the selection or appointment of all necessary agents or servants, clerks, accountants, etc., including an officer termed a "cashier."

Ans. My appointments were subject to the control of the directors.

Int. 6. Whether or not the cashier, so called, was under the direction and control or subject to the instructions of the manager in the performance of his duties and the disbursements of moneys. If not, then under whose direction or control was he?

Ans. The cashier was under the immediate control of the manager, but in matters of importance relating to the money department the directors exercised the control through the manager.

Int. 7. Whether or not, in the division of the net earnings between the two corporations, it was the custom of the manager (while you were such manager) to make his drafts or orders upon the cashier for the amounts becoming payable to each party as its share of the net earnings under the contract.

Ans. It was the custom.

Int. 8. Please look at paper now shown you and state what it is.

Ans. It is a receipt from the treasurer of the Boston and Lowell railroad to the Nashua and Lowell railroad.

Int. 9. Whether or not the said paper is in the words and figures following, to wit:

$6,002.66. BOSTON, *May* 8, 1873.

Received of the Nashua & Lowell Railroad Corporation six thousand and two and $\frac{66}{100}$ dollars, being thirty-one per cent. of $19,653.76, being interest paid and accrued from sundry dates of payment to April 1, 1872, on investments as follows:

Improvements in Boston.

Improvements in Winchester and Mystic River railroad, as per vote of directors passed July 23, 1872.

Paid June 18, 1873.

C. E. A. BARTLETT,
Treasurer Boston & Lowell R. R.

Ans. It is.

85 Int. 10. Whether this payment was made before or after any other payment or payments were made in pursuance of the directors' vote of July 23, 1872.

Ans. This does not seem to have been a matter under my supervision, being between the two separate corporations. I cannot from memory answer the question.

Int. 11. Whether or not you were clerk of the directors of Nashua and Lowell Railroad Company in 1872 and for many years before that time.

Ans. I was.

Int. 12. Please look at the book now shown you and state whether it contained the records of the directors of that company as kept by you while clerk, etc.

Ans. It does.

(Book shown witness is marked for identification "directors' records, J. G. S., examiner.")

Int. 13. It appears by this record that the meeting of July 23, 1872, was opened or begun at the manager's office and then adjourned to Young's Hotel. Whether or not the directors of the Boston and Lowell corporation as well as the directors of the Nashua and Lowell corporation were present on both occasions—*i. e.*, both before the adjournment and afterward.

Ans. My memory wouldn't serve me sufficiently well to enable me to testify certainly whether they were or not. My record shows that after the adjournment to Young's Hotel Judge Abbott, of the Boston and Lowell board, was present.

Int. 14. By whom was the motion made under which the first vote recorded as taken at Young's Hotel was passed?

Ans. The record does not show who made the motion and my memory does not serve me in regard to it.

Int. 15. Please look at the paper now shown you, marked "Exhibit 6, J. G. S., ex'r," annexed hereto, and state what it is and whether or not it is dated the day before the meeting of directors of July 23, 1872, above referred to.

(Defendants object to the question and to the admission of the exhibit as incompetent.)

86 Ans. The paper is a letter from Judge Abbott apparently to myself, though my name is not in it, dated July 22, without the year, stating that he might not be able to attend a meeting in the morning, but will come at two o'clock; that he will have votes prepared upon the report of the committee as to payments of interest for the improvements, etc., and that if he was not present in the morning he wished the meeting adjourned till afternoon.

(Exhibit 6 here put in evidence, subject to defendants' objection, as follows:

EXHIBIT 6. J. G. S., Ex'r.

MY DEAR GENERAL: I may not be able to be present in the morning at the meeting, from another meeting I must attend, but will come in at 2 o'clock. I trust there will be members enough present to make a quorum then, as I will have the votes prepared upon the report of the committee as to payments of int. for the improvements, etc. If I am not present in the morning please let the meeting stand unadjourned till afternoon.

Sincerely your friend, J. G. ABBOTT.

42 Court, 22 July.)

Int. 16. Whether or not that letter refers to the meeting of directors which was to be held on the twenty-third day of July, 1872; if not, how otherwise?

Ans. I think it refers to that meeting.

Int. 17. Whether or not the vote or votes mentioned in the letter refers to the vote first passed after the adjournment to Young's Hotel.

Ans. I think it does.

Int. 18. If this be so and if Judge Abbott brought or presented the subject-matter of the vote to the consideration of the meeeting, do you think the vote was submitted by any one else than Judge Abbott; and, if so, by whom, other than Judge Abbott, do you think it was presented? Have you no recollection upon the matter?

(Objected to as leading in form, as suggestive, and as asking for an opinion.)

Ans. I have not any recollection upon the matter. I think it probable that the matter was submitted by a member of the board of Nashua and Lowell directors.

87 Int. 19. If this vote was submitted by one of the Nashua and Lowell directors should not that fact have been set forth in your record, and why, in that case, was it not so stated by you as clerk?

Ans. It was not customary in all cases to state in the record who made a motion or who submitted a matter, but simply to state that such a vote was passed. I see this by glancing at the records.

Int. 20. Whether or not the directors of the Boston and Lowell Railroad Company were not present with the Nashua and Lowell railroad directors after the adjournment to Young's Hotel.

Ans. I don't recollect.

Int. 21. Was it not the usual custom to hold monthly meetings of the directors of both corporations together at the same time and place, and after the transaction of the business to adjourn to Young's Hotel for the purpose of dining together?

Ans. It was the usual custom to meet together, and they frequently dined together after meeting.

Int. 22. Why was this meeting of July 23, 1872, adjourned to

Young's Hotel, 2 p. m., unless for the purpose of dining together at that hotel?

(Objected to as leading.)

Ans. I cannot say.

Int. 23. Whether or not it is, in your judgment, probable that the purpose of this place of adjournment was to enable the directors to dine together.

Ans. I think that is probable.

Int. 24. Whether or not the action taken at Young's Hotel, and stated in your record as the action of the Nashua and Lowell Corporation, was participated in by the directors of both corporations.

Ans. I could not tell without referring to the records of the other corporation.

Int. 25. Were the votes passed at Young's Hotel taken or passed in the dining-room, or wherever the dinner was served, or in some other place, and whether the dinner preceded or followed the passage of said votes, and whether or not the first vote recorded as passed at Young's Hotel was the subject of remark, debate, or discussion by any one; and, if so, by whom? Was it passed unanimously, or how otherwise, and who voted for it?

88 Ans. I do not recollect what room the meeting was held in, whether the dining-room or otherwise. The recorded hour of the meeting would indicate that it was before dinner time. Messrs. Crowninshield, Stearns, Richardson, and Sigourney, composing four-fifths of the board of directors, were present. The record does not show whether the vote was unanimous, and does not state who voted for and against it. I have no recollection on this point outside the record. I have never heard any comment upon the fact of the meeting being held at Young's Hotel.

Int. 26. Whether or not the vote upon the subject of expenditures made or being made for improvements was submitted to those members of both boards of directors then present at one and the same moment of time and as a single proposition for joint and simultaneous action, or was separately submitted to the members of each board of directors for their distinct and separate action thereon successively—*i. e.*, were there two votes taken, one by each board, or only one vote joined in by both boards?

Ans. I have no recollection.

Int. 27. It is provided in this vote that the Boston and Lowell Corporation should be paid from the receipts of the roads of both corporations under the contract, interest at the rate of seven per cent. upon the cost or outlay upon the new passenger stations at Boston and Winchester and the Mystic River railroad, all belonging solely to the Boston and Lowell Railroad Company, and that these payments be charged to or treated as the cost or expense of operating the two roads under the joint contract. Whether or not, according to your experience in railroad book-keeping or accounts, such payments could correctly or properly be treated as the expenses of operating the two roads or of either of said roads.

(Objected to as incompetent and as asking for an opinion.)

Ans. I should say that there is nothing in that arrangement inconsistent with the scheme of operation under which the two roads worked.

Int. 28. Whether or not, in your judgment, as a man of large experience in railroads, it is consistent with reason or usage to treat money expended in railroad construction as entitled to bear or draw interest, payable from or out of the receipts or earnings of the
89 same road, or of some other road being operated jointly therewith. Are not the words "operating expenses," as applied to railroads, understood by you to relate to the actual cost of working or operating railroads already constructed; if not, how otherwise?

(Objected to as leading, incompetent, and as asking an opinion.)

Ans. My opinion would depend upon the contracts or agreements under which such entries were made. To the last part of the question I answer, Not always.

Int. 29. Do you know of any other instance than this where the officers or directors of a railroad ever voted to charge to operating expense account a sum of money equal to what the interest on the cost of a portion of a railroad would be if the cost of such railroad were a proper subject on which to base or found an interest charge as against the same railroad or any other connecting road?

(Objected to as incompetent.)

Ans. I think I know of other instances.

Int. 30. Please state any other such instance.

(Objected to as incompetent.)

Ans. I have in mind an instance, nearer at home than any other, of the action of the directors of the Nashua and Lowell railroad, reported in their Thirty-eighth Report of Directors, for the year 1873. Under this report the directors of the Nashua and Lowell railroad (Mr. Brooks objects to any further answer not responsive to the question) provided for new structures in Lowell and reported to their stockholders that the interest would be paid by the united roads. I know of no other instance.

Int. 31. Does not the instance you mention come under this same vote of July 23, 1872; if not, how otherwise?

Ans. I presume it does.

Int. 32. You were, I believe, one of the directors of the Boston and Lowell Railroad Company during the year 1874 and one of the signers of the report of the directors to the stockholders for the financial year ending Sept. 30, 1874. By whom was that report drawn up or framed?

Ans. I was a director at that time. It was probably drafted by myself and submitted to the board.

90 Int. 33. Will you be good enough to read that portion of the directors' annual report for 1874 of the Boston and Lowell Railroad Company, at the middle of page 11, in these words:

"The Partnership between the Boston and Lowell and Nashua and Lowell Roads.

"The working operations of this company were united with those of the Nashua and Lowell Railroad Company by an experimental contract made in 1857 and renewed in 1858 for twenty years. Since then the two roads, with their respective branches, have been worked as one.

"The combination embraces the roads of six small railroad companies in Massachusetts and three in New Hampshire. The Boston and Lowell puts in its main road with its Mystic, its Woburn, its Stoneham, and its Lexington Branches, and its leases of the Lowell and Lawrence, the Salem and Lowell, and Middlesex Central roads.

"The Northern and Lowell puts in its main road and its leases of the Stony Brook, the Wilton, and the Peterboro' roads."

If these paragraphs were not originally framed or drawn up by you, do they contain a correct statement of the facts and relations of the parties under the twenty years' contract, as you understand that contract; if not, how otherwise?

Ans. I understand this statement as a popular statement, not an exact legal statement of the condition of things.

Int. 34. If taken as a popular statement rather than a strictly legal one, is it or not, in your judgment, correct; if not, how otherwise?

Ans. In my judgment, it is correct in general terms.

Int. 35. Whether or not the provisions of the vote of July 23, 1872, in regard to making up the expense account of operating the Boston and Lowell railroad, were followed, or pursued, or adopted by you as manager.

Ans. I presume they were.

Int. 36. Does not the annual returns of the Boston and Lowell Railroad Company to the railroad commissioners of Massachusetts for the year ending Sept. 30, 1874, show the sum of $39,540.64 as paid to the Boston and Lowell Railroad Company by the Nashua and Lowell Railroad Company as and for "interest on improvements?" (See p. 79.)

(Objected to as calling for the contents of a written report.)

91 Ans. It does.

Int. 37. Whether or not the return referred to was correct.

(Same objection.)

Ans. I have no reason to doubt its correctness.

Int. 38. After the vote of July 23, 1872, and while you were manager, whether or not the Boston and Lowell Railroad Company was paid out of the joint receipts or earnings of the two roads a sum equal to the interest of the cost of the Boston improvements, so called, and whether or not, but for this payment to the Boston and Lowell Railroad Company out of such receipts, the Nashua and Lowell

Railroad Company would not have been paid, as its 31 per cent. of said joint receipts, a much larger sum than it actually received.

Ans. I have no recollection about it, but I have no doubt it was so, and that the Boston and Lowell road would have received more if this interest had not been paid.

GEO. STARK.

Attest: JOHN G. STETSON, *Examiner.*

BOSTON, *Nov.* 12, 1884.

Present: Francis A. Brooks, of counsel for complainants; S. A. B. Abbott, of counsel for defendants.

The complainants offer in evidence the following additional documents, subject to objections as to competency, all other objections being waived.

7. Extract from record of Nashua and Lowell Railroad Corporation, directors' meeting of June 9, 1876, marked "Exhibit 7, J. G. S., ex'r."

8. Record of meeting of directors of Nashua and Lowell Railroad Corporation, held June 25, 1877, marked "Exhibit 8, J. G. S., ex'r."

9. Extract from record of meeting of directors of Nashua and Lowell Railroad Corporation, held Aug. 25, 1877, marked "Exhibit 9, J. G. S., ex'r."

10. Extract from record of meeting of directors of Nashua and Lowell Railroad Corporation, held Sept. 25, 1877, marked "Exhibit 10, J. G. S., ex'r."

92 11. Extract from record of meeting of directors of Nashua and Lowell Railroad Corporation, held Oct. 20, 1877, marked "Exhibit 11, J. G. S., ex'r."

Attest: JOHN G. STETSON, *Examiner.*

EXHIBIT 7. J. G. S., Ex'r.

Extract from Record of Nash. & L. R. Co.'s Directors' Meeting, Held June 9, 1876.

"Voted, That in consequence of the dissatisfaction of the stockholders of the Nashua & Lowell Railroad Company, at the interpretation of the joint contract between this road and the Boston & Lowell railroad, as heretofore carried out, the directors of the Nashua & Lowell Railroad Company feel constrained to give notice to the directors of the Boston & Lowell Railroad Company of their intention to avail themselves of their rights under article 17 of that contract, and they do hereby ask that the whole subject be referred to the referees, as therein provided."

EXHIBIT 8. J. G. S., Ex'r.

BOSTON, MASS., *June* 25, 1877.

The directors of the Nashua & Lowell R. R. Corporation met at the office of W. A. Tower, in Boston.

Present: Messrs. Tower, Richardson, Brooks, McKean, Graves, White, and Bailey.

The president stated that the object of the meeting was to consider the reports from the committee appointed to investigate the legal relations and accounts between this corporation and the Boston & Lowell and Peterborough Railroad Corporations made at the last meeting of this board.

Voted, That the majority and minority reports of that committee be taken from the table and considered.

Mr. Brooks moved that the report of the majority of the
93 committee apointed to investigate the legal relations and accounts between this corporation and the Boston & Lowell & Peterborough Railroad Companies be accepted and adopted, and the votes therein recommended be passed.

Mr Richardson moved to recommit both reports with instructions substantially as follows, to wit:

Whereas since the contract for joint operation was made with the Boston & Lowell railroad the joint business has increased from $729,346.70 for the year ending Oct. 1, 1859, to $1,980,634.01 for the year ending Oct. 1, 1873; and whereas all the profits of this increase has [have] been divided between the two companies in the proportion established by the original contract; and whereas this increase of business has required large outlays for its accommodation on the part of each company:

Voted, That this committee be requested to ascertain and report what outlays the Nashua & Lowell R. R. Co. has made for the accommodation of the joint business, and amount of said outlays, and what compensation has been received therefor, and also what outlays have been thus made, and to what amount, for which this Co. has received no compensation.

Voted, That this committee be requested to ascertain and report what outlays the Boston & Lowell R. R. Co. has made for the accommodation of the joint business, and the amount of said outlays, and what compensation has been received therefor, and also what outlays has [have] been made, and to what amount, for which the Boston & Lowell R. R. Co. has received no compensation.

Voted, That this committee be requested to ascertain and report in what manner and proportion the burden of increased accommodations and obligations for the benefit of the joint business has been borne by the two companies, and whether any and what modification should be made in the arrangements by which these burdens and obligations or compensations therefor have been apportioned, so that these matters may be clearly understood and amicably adjusted, and so that each Co. shall bear joint proportion of the burdens and obligations required by the increased business, as well as receive its proportion of the profits thereof.

The question on this motion was decided in the negative
94 and the motion did not prevail. The question recurring upon Mr. Brooks' motion, Mr. Richardson called for the ayes and nays, which was ordered, and resulted as follows:

Ayes, Messrs. Tower, Brooks, Graves, & White.

Nays, Richardson, McKean, & Bailey, and the motion prevailed, passing the following vote:

Voted, That whereas the vote of directors passed July 23, 1872, providing that the Boston & Lowell Railroad Co. should receive from the Nashua Company interest at seven per cent. upon thirty-one per cent. of the cost or value of additions made by the former Co. to its property or construction account, is deemed by us to be in plain violation of both the terms and the spirit of the joint-traffic contract itself, said vote of July 23, 1872, is hereby rescinded, not intending hereby to admit that it was ever competent for the directors by passing said vote to modify the provisions of said joint-traffic contract relating to division of expenses, or that said vote ever had any legal operation whatever in depriving the Nashau & Lowell Co. of the benefits of the provisions of said contract relating to the division of the joint earnings under the same.

Voted, That the clerk of the directors transmit a copy of this vote to the directors of the Boston & Lowell R. R. Co.

Voted, To dissolve the meeting.

Attest: W. W. BAILEY, *Clerk.*

EXHIBIT 9. J. G. S., Ex'r.

Extract from Record of Meeting of Directors of the Nashua & Lowell R. R. Co., Held at Boston Aug. 25, 1877.

Present: Messrs. Tower, Richardson, McKean, Brooks, White, Graves, and Bailey.

* * * * * * *

Mr. Brooks offered the following preamble and resolution:

Whereas there exists a difference of opinion between the Nashua & Lowell and the Boston & Lowell Railroad Corporations in regard to the propriety of the charge made to the Nashua & Lowell
95 Railroad Corporation for 31 per cent. of the interest upon the cost of the Boston improvement, so called, under and by virtue of a vote of directors of the Nashua & Lowell Corporation passed July 23, 1872, therefore, to avoid all difficulty on this point—

Resolved, That this subject be referred for determination to the referees named in the joint-traffic contract, and that the Boston and Lowell Railroad Corporation be requested to concur in such.

Mr. Richardson moved to amend the same, so as to include all questions relating to the division of expenses, payments, and income between the two corporations.

Voted, That the amendment moved by Mr. Richardson be rejected.

Voted, That the preamble and resolution offered by Mr. Brooks be adopted.

* * * * * * *

Voted, That the meeting be dissolved.

A true record.

Attest: W. W. BAILEY, *Clerk.*

EXHIBIT 10. J. G. S., Ex'r.

Extract from Record of Meeting of the Directors of the Nashua and Lowell Railroad Corporation Held Sept. 25, 1877.

Present: Messrs. Tower, Richardson, Brooks, White, and Bailey.

On motion of Mr. Brooks—

Voted, That a committee of three be appointed for preparing the annual report to the Mass. R. R. commissioners for the year ending Sept. 30, 1877, and for ascertaining and receiving the Nashua & Lowell R. R. Company's share of the net earnings of the two corporations under the joint-traffic contract since April 1, 1877, and to consider the subject of declaring a dividend of such earnings, and to receive any sums to which the Nashua & Lowell R. R. Company is entitled, if anything, not heretofore accounted for.

The president appointed Messrs. Brooks, Bailey, and White the committee in accordance with the previous vote.

A true record.

Attest: W. W. BAILEY, *Clerk.*

96 EXHIBIT 11. J. G. S., Ex'r.

Extract from Record of Meeting of Directors of the Nashua & Lowell R. R. Corporation Held Oct. 20, 1877, at the Office of Tower, Giddings & Co.

Present: Messrs. Tower, Richardson, Brooks, McKean, Graves, White, and Bailey.

Mr. Brooks offered the following resolution:

Whereas the question of charging the Nashua & Lowell R. R. Co. with 31 per cent. of interest upon the cost of the Boston and Winchester depot and stock purchase in Salem & Lowell and Lowell & Lawrence R. R. Companies and of charging the Boston & Lowell R. R. Co. with 69 per cent. of the cost of the freight depot at Lowell is in dispute between the Nashua & Lowell and Boston & Lowell R. R. Companies:

Therefore resolved, That, for the purpose of arriving at an amicable adjustment of the joint accounts between the two roads for the six months ending Sept. 30, 1877, the Nashua & Lowell R. R. Co. is willing to be charged in joint account with one-half of 31 per cent. of the interest of said investments made by the Boston & Lowell R. R. Co., and that the Boston & Lowell R. R. Co. may be charged with only one-half of the 69 per cent. of the outlay made by this company upon its new freight-house at Lowell.

Mr. Richardson moved that the resolution be referred to a committee of two of this board to meet a like committee of the Boston & Lowell board of directors to determine whether such a compromise substantially can be carried out between the two corporations, and report at the joint meeting Oct. 23 inst.

Mr. Richardson's motion was rejected. Mr. Brooks' resolution passed.

Mr. Brooks offered the following resolution, which was adopted:

Resolved, That the president of this company be requested to communicate the foregoing resolution to the Boston and
97 Lowell R. R. Co. at once, and to request definite action thereon by them on or before the 23d inst.

Voted to dissolve the meeting.

A true record.

Attest: W. W. BAILEY, *Clerk.*

EXHIBIT 12. J. G. S., Ex'r.

Vote of Directors of Boston & Lowell R. Co. at Meeting Held Oct. 9, 1877.

Voted, That the directors of this corporation, if the directors of the Nashua & Lowell R. R. Co. shall desire so to do, will submit all matters and questions in reference to and growing out of the joint transaction of business by said corporations and the joint-traffic contract between them, and all other differences and questions between them of any description and all claims of any nature of the one corporation upon the other to the arbitrament and determination of the referees named in said joint-traffic contract.

Voted, That a copy of said vote be transmitted to the directors of the Nashua & Lowell R. R. Co. in reply to their note of August 25, 1877, on the same subject, received at the meeting of this board, Sept. 11, 1877.

* * * * * * *

Attest: C. E. CRAM, *Clerk.*

Deposition of Charles E. Cram.

Direct examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

BOSTON, *Nov.* 12, 1884.

Int. 1. Please state your name, age, residence; and, if you are clerk of the Boston and Lowell Railroad Corporation and of the board of directors thereof, state how long you have been such clerk.

98 Ans. Charles E. Cram; forty-five; Winchester, Mass.; I was appointed Aug. 14, 1877, and have continued to be clerk since that time.

Int. 2. Whether, during the existence of the joint-traffic contract between the Boston and Lowell and Nashua and Lowell Companies it was the custom of the board of directors of both corporations to hold monthly meetings together, jointly or in common, in the city of Boston.

(Objected to.)

Ans. It was.

Int. 3. Whether or not there was present at such meetings a clerk to make a record of the proceedings in behalf of each of the two corporations.

(Objected to.)

Ans. A clerk was present representing each corporation.

Int. 4. Whether or not in record of these joint meetings, as kept by you, the fact that they were participated in by the Nashua and Lowell directors was set forth, or whether your record contained evidence of any action had or participated in on these occasions by the Nashua and Lowell directors.

(Objected to.)

Ans. It was not necessarily set forth. Sometimes my record showed that the meeting was joint, but not always.

Int. 5. Whether or not ordinarily your record of these joint meetings was made up without showing the presence or participation therein of the Nashua and Lowell directors.

(Objected to.)

Ans. I can hardly answer that question; I should say it was about an even thing. Generally speaking, the fact of the joint meeting only appeared when committees were appointed involving the joint action of both boards.

Int. 6. Whether or not, when you first became clerk, the same person, Gov. Talbot, the president of the Boston and Lowell Company, usually presided at these joint meetings, if present.

(Objected to.)

Ans. My recollection is that he always presided, if present.

Int. 7. Whether or not at such meetings motions or votes
99 were put at one and the same time for the action of all the directors present; if not how otherwise.

(Objected to.)

Ans. When the votes related to joint matters they were passed upon jointly.

Int. 8. Please refer to a vote found in your record of joint meetings held Jan. 24, 1871, relating to the new Boston station, and read the same to the examiner, to be taken down by him in answer to this question.

(Objected to.)

Ans. I find an allusion to the matter, not, however, in the form of a vote. It is as follows, as the record shows:

"The manager submitted and read an estimate of the cost of the proposed new station-house in Boston and presented plans of same."

Int. 9. Please refer to record of a joint meeting held Jan. 23, 1872, and state what the record shows to have been done by the directors

of the Boston and Lowell Company in regard to the new Boston depot at that time, if anything.

(Objected to.)

Ans. The record is as follows:

"The manager submitted plans and drawings of the contemplated depot building in Boston, when it was voted that the manager proceed to the erection of the same substantially in accordance with the plans submitted."

Int. 10. Please look at the record of joint meeting held July 23, 1872, and state whether it contains a vote passed relating to the payment to the Boston and Lowell Company, out of the receipts of the joint corporations, of interest on the cost of the Boston depot and other property of the Boston and Lowell Company.

(Objected to.)

Ans. It does contain such a vote.

Int. 11. Please look at the record, made in behalf of the Nashua and Lowell railroad directors, of the joint meeting of July 23, 1872, as set forth in Exhibit 4, and state whether or not the vote last referred to appears in both records in the same language.

(Objected to.)

100 Ans. The records seem to be identical.

Int. 12. Please look at paper now shown you, marked "Exhibit 12, J. G. S., ex'r," and state whether it is a correct copy of a vote or votes passed by the Boston and Lowell Company at a separate meeting of their directors, held Oct. 9, 1877.

(Objected to.)

Ans. It is a correct copy.

Int. 13. Please refer to the record of a vote passed at a joint meeting of the directors of both companies held Sept. 26, 1876, and read the vote therein relating to the printing of the votes of the directors of both corporations.

Ans. I read as follows:

"Voted, That Messrs. Burke and Amory, the latter for the Nashua & Lowell Railroad Company, be a committee to read over the copies from the records of votes passed by the joint boards and report with a view to their being put into print."

Int. 14. Do you know whether this vote was carried out or anything done with regard to the preparation of a book containing such votes?

Ans. I don't know anything further than what I have just said. The only book that I know of was not printed.

Int. 15. If it came to your knowledge in any way that a book containing the votes of both boards of directors was being made or

prepared by any one at any time, please state your knowledge or information in that respect.

(Objected to.)

Ans. My recollection is that such a book was begun, but whether finished or not I am in doubt, as the one who had the matter in charge died shortly after my attention was first called to the subject. I don't know whether he finished it or not.

(Cross-examination reserved.)

CHARLES E. CRAM.

Attest: JOHN E. STETSON, *Examiner.*

101 EXHIBIT 13.

BOSTON, *Nov.* 19, 1884.

Present: Francis A. Brooks, Esq., of counsel for complainants.

Due adjournment having been had to this time and place and counsel for defendants not being present, counsel for complainants states that he will proceed with his evidence, consenting that counsel for defendants may enter objections hereafter to any evidence introduced by him with the same effect as if entered as the evidence is being introduced, and also reserving to the defendants all rights of cross-examination.

Counsel for complainants thereupon offers in evidence an extract from the records of directors of Nashua and Lowell Railroad Company, being page 101 of said records, being record in part of meeting held May 28, 1872, and the same is marked "Exhibit 13, J. G. S., ex'r."

Counsel for complainants produces a pamphlet entitled "Rules of the Boston and Lowell and Nashua and Lowell Railroad Companies for the government of the executive service," etc., and offers in evidence the first five pages thereof, and the same is marked "Exhibit 14, J. G. S., ex'r."

Counsel for complainants thereupon examines as witnesses Charles E. A. Bartlett and William W. Bailey.

Attest: JOHN G. STETSON, *Examiner.*

EXHIBIT 13. J. G. S., Ex'r.

Copy of Record of Directors of Nash. & L. R. R. Co., being page 101 *of said Records, being Record in Part of Meeting Held May* 28*th*, 1872.

BOSTON, *May* 28*th*, 1872.

At a meeting of the directors of the Nashua & Lowell Railroad Corporation held at the office of the manager, in Boston, on Tuesday, May 28th, 1872, at 11 o'clock a. m.

102 Present: Messrs. Crowninshield, Spalding, and Sigourney.

The monthly statement of receipts and expenditures for April was read.

Printed copies entitled "Rules of the Boston & Lowell and Nashua & Lowell Railroad Companies for the government of the executive service, revised and adopted by the board of directors," was submitted by the manager, when it was

Voted, That the same be adopted by this board.

Printed copies entitled "Local Passenger Tariff, Boston, Lowell and Nashua railroad and branches, takes effect June 1st, 1872," was submitted by the manager, when it was

Voted, That the same be adopted by this board.

EXHIBIT 14. J. G. S., Ex'r.

(Page 1.)

Rules of the Boston & Lowell and Nashua & Lowell Railroad Companies for the Government of the Executive Service. Revised and Adopted by the Boards of Directors.

(Page 2 is blank.)

(Page 3.)

General Rules and Duties of Officers and Agents.

Manager.

The chief executive officer of the joint roads shall be entitled the manager.

It is his duty to act as the agent of the directors, and, as the responsible head of the joint companies, to direct and control their affairs in every department.

He shall carry out the views of the directors in making all contracts for the management, operation, maintenance, and business connections of the roads, enforce the regulations adopted by the board, and devote his time and abilities to promote the best interests of the joint companies.

103 He shall have power to employ for the service of the companies all necessary agents or servants, and may also dismiss or authorize the dismissal of any person so employed for neglect or violations of duty or for incompetence or other sufficient cause.

The books, records, and statistics of the various departments shall be kept under his immediate supervision. He shall see that all the accounts are duly and promptly kept up; that the joint property is well preserved and properly used, requiring a strict accountability from all engaged in every department of the service.

All pay-rolls, bills, or claims against the company shall be submitted to him before payment, and shall only be paid after his approval shall have been endorsed on the same; nor shall any purchases be made on account of the company without his knowledge or general permission.

He shall confer with the board in relation to all measures con-

(Page 4.)

templated, and shall report from time to time the condition of the several affairs under his charge, and suggest such arrangements as the common interest may, in his opinion, require.

Superintendent.

The superintendent shall have immediate charge and control, under the direction of the manager, of the running departments of the joint roads and branches, and his orders must be respected and obeyed accordingly by all employed.

It shall be his especial duty to see that the subordinate officers and servants of the company are at all proper times on the alert and faithfully performing their respective duties; that the rolling stock is kept in perfect order for use; that the running arrangements of the roads are well understood and properly carried out; that no unnecessary delays occur in running the trains, and that all the precautionary rules of the road to promote the safety and comfort of travellers are fully enforced.

He shall have charge of the repair shops and of the motive power, rolling stock, and fixed machinery, and keep the same in thorough repair, in accordance with the direction of the manager.

104 He shall assign to the workmen under his charge such hours of working as may be prescribed, and, through the master machinists, enforce a strict observance of the regulations of the shops.

He shall also confer and advise with the manager in all matters of importance within his supervision, and, so far as in his power, assist him in the promotion of efficiency and economy in every department.

Assistant superintendents.

In cases of emergency the general freight agent will act as assistant superintendent on the Boston & Lowell road and the Mystic, Stoneham, Woburn, and Lexington Branches.

The agent at Lowell will act as assistant superintendent on the Salem & Lowell, Lowell & Lawrence, and Stony Brook roads, and the agent at Nashua will act as assistant superintendent on the Nashua & Lowell and Wilton roads.

(Page 5.)

Cashier.

The cashier shall have charge of receiving and paying out all moneys of the joint roads, and shall give sureties to the satisfaction of the directors for the faithful keeping and proper appropriation of the funds.

He shall receive daily at his office, in Boston, all moneys, securities, or certificates of deposit forwarded to him by the collecting agents, giving proper credit for the same on his books, and shall

make a daily report to the manager of the balances on hand, and such other reports as may be required.

His payments shall only be upon such orders, bills, pay-rolls, or accounts as shall have been drawn or approved in writing or otherwise authorized by the manager and duly classified and recorded by the chief clerk; and said vouchers, when duly paid and receipted, shall be returned for preservation to the chief clerk, who shall pass his receipt for the same.

Chief clerk.

The chief clerk shall keep, at the office of the manager, and in the forms by him prescribed, the entire accounts of the income
105 and expense of the roads, and also such books of record or statistics as may be required.

He shall make up all accounts for settlement with the freight and ticket agents, and also with connecting roads, and all other parties whose accounts are not in due course regularly adjusted in detail through the subordinate departments. He shall make up and apportion the net earnings between the roads, under the direction of the manager, in accordance with the provisions of the joint contract.

His accounts shall be so arranged as to constitute a check upon all the financial departments, and no funds of the joint roads shall in any way pass through his hands.

He shall also assist the manager in any and all matters of office business wherein his aid may be required.

Deposition of Charles E. A. Bartlett.

Direct examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

BOSTON, *Nov.* 19, 1884.

Int. 1. What is your name, age, and residence? Are you now the treasurer of the Boston and Lowell Railroad Corporation, and how long have you been such treasurer?

Ans. Charles E. A. Bartlett; forty-eight; Chelmsford, Mass.; I was elected March 23, 1869, and since then have been treasurer.

Int. 2. Were you in the employ of the Boston and Lowell and Nashua and Lowell Railroad Corporations while these two roads were operated together under the twenty years' joint contract, so called? If so, in what capacity and during what period of time?

Ans. I was; as ticket-seller, paymaster, and cashier, becoming cashier Aug. 28, 1866, and so continued during the continuance of the contract.

Int. 3. Please look at the pamphlet now shown you, marked Exhibit 14, entitled "Rules of the Boston and Lowell and Nashua and Lowell Railroad Companies for the government of the executive service, revised and adopted by the boards of directors,"
106 and purporting to have been printed at Boston in 1872, and state whether or not it was in use while you were cashier.

Ans. It was.

Int. 4. Please look at page five of said pamphlet, under the heading "Cashier," and state whether or not your duties as cashier of the joint roads are there particularly stated and defined or prescribed. If not, how otherwise?

Ans. They are, with such additional verbal instructions as were from time to time received from the manager.

Int. 5. Whether or not those rules were observed by yourself and the other employees of the joint roads therein mentioned. If not, how otherwise?

Ans. They were by myself.

Int. 6. Whether or not the joint net earnings were divided or paid over by you to the two corporations in April and October of each year or at intervals of six months during the existence of the joint contract.

Ans. They were.

Int. 7. Upon whose authority and by whose direction was this done? In what way was such authority or direction signified or made known to you?

Ans. On the approval of the manager, payments being made on his draft on me as cashier in favor of each of the two corporations. These drafts were made every six months, April and October of each year.

Int. 8. If any payments were made by you as cashier from the joint funds or earnings of the two corporations to the Boston and Lowell Company alone as and for interest, reckoned at seven per cent., upon the cost of shares of the capital stock of the Salem and Lowell and Lowell and Lawrence Railroad Corporations, bought and owned solely by the Boston and Lowell Railroad Company, please state the time and amount of such payments and of each of them, the total amount of all such payments, and the amount in all taken from the proper share of the Nashua and Lowell Railroad Company in making all such payments.

Ans. In answer to this question I present schedule showing the amounts and times of such payments, as follows:

107 SCHEDULE.

Interest on Investment in Stock of the Salem & Lowell R. R. and Lowell & Lawrence R. R. Charged to Boston, Lowell and Nashua Railroads by the Boston & Lowell Railroad Corporation and Paid to said Last-Named Corporation.

Octo. 1, 1871	$6,017 69
April 1, 1872	5,146 76
Octo. 1, "	7,093 43
April 1, 1873	5,475 59
Octo. 1, "	7,103 59
April 1, 1874	5,475 59
Octo. 1 "	7,103 59
April 1, 1875	5,475 59
Octo. 1, "	7,103 59

April 1, 1876	$5,067 84
Octo. 1, "	6,289 59
April 1, 1877	5,882 59
Octo. 1, "	6,289 59
April 1, 1878	5,882 59
Octo. 1, "	6,289 59
Dec. 1, "	4,032 87
	$95,730 35
31%	29,676 41

Int. 9. If any payments were made by you as cashier from the said joint funds or earnings of both roads to the Boston and Lowell Railroad Company alone as and for interest, reckoned at seven per cent., upon the cost of the new passenger stations at Boston and Winchester and the Mystic River railroad, all being the sole property of the Boston and Lowell Corporation, please state the times and amount of all such payments made before the month of June, 1877; also the times and amounts of all such payments made after June, 1877, and the portion or amount of such payments which belonged to or was taken from the share or interest of the Nashua and Lowell Railroad Company in such joint funds.

Ans. In answer to this question I present schedule showing the amounts and times of such payments. The aggregate of such payments made before June, 1877, is $434,730.07, and payments made after that date, $169,154.40.

108 (The schedule presented is put in evidence and marked "Exhibit 15, J. G. S., ex'r.")

Int. 10. Whether or not, as treasurer of the Boston and Lowell Railroad Company, you received from the Nashua and Lowell Railroad Company $6,002.66, on or about the eighteenth day of June, 1873, under or in pursuance of the vote of directors passed July 23, 1872, as set forth in the original receipt now shown you and marked "Exhibit 1" by the examiner.

Ans. I did. The receipt reads as follows:

EXHIBIT 1. J. G. S., Ex'r.

No. 7.

$6,002.66. BOSTON, *May* 8, 1873.

Received of the Nashua and Lowell Railroad Corporation six thousand & two & $\frac{66}{100}$ dollars, being thirty-one per cent. of $19,653.76, being interest paid and accrued from sundry dates of payment to April 1, 1872, on investments as follows: Improvement in Boston; improvements in Winchester and Mystic River railroad, as per vote of directors passed July 23, 1872.

Paid June 18th, 1873.

C. E. A. BARTLETT,
Treas'r Bos. and Lowell R. R.

Int. 11. Was this sum of $6,002.66 any part of the sums mentioned by you in your ninth answer?

Ans. No, sir.

Int. 12. Whether this sum of $6,002.66 so paid you as treasurer of Boston and Lowell Railroad Company was reckoned as thirty-one per cent. of the interest on the amount expended in improvements of the Boston and Lowell railroad at Boston (including station at Winchester and Mystic River railroad) prior to April 1, 1872—that is, interest on such expenditures from the time they were made until April 1, 1872; if not, how otherwise?

Ans. It was.

Int. 13. Whether or not you, as cashier of the two corporations and treasurer of the Boston and Lowell Railroad Corporation, made up this interest account as directed by the vote of July 23, 1872.

Ans. I did.

Int. 14. Whether or not, in making the payment mentioned in Exhibit 15, ninth answer, out of the joint receipts of the two corporations, or in receiving the same as per vote of directors passed July 23, 1872, you understood you were acting under a vote passed by the directors of both corporations or of one only.

109

Ans. These payments were made on the approval of the manager, wholly by his directions.

Int. 15. Whether the expenditures by the Boston and Lowell Railroad Company in building the new passenger stations at Boston and Winchester on its own road were treated by you in your books as expenses of construction or expenses of operating the road. Under what head were they finally entered in making up your returns to the railroad commissioners of Massachusetts?

Ans. They were charged to construction.

Int 16. Whether or not, in your judgment as a railroad accountant, such expenditures could be properly treated as expenses of operating the Boston and Lowell railroad.

Ans. No, sir.

C. E. A. BARTLETT.

Attest: JOHN G. STETSON, *Examiner.*

BOSTON, *Nov.* 19, 1884.

The counsel for the orators here gives notice to the counsel of the defendants that, at the time of drawing the bill of complaint in this cause, he was not aware that the sum of $6,002.66 had been paid over by the Boston and Lowell Railroad Corporation or its treasurer, as shown by the voucher here produced and marked "Exhibit 1," nor of the sum of $6,017.96 having been paid over to the Boston and Lowell Railroad Company out of funds belonging wholly to the Nashua and Lowell Railroad Company, on or before the first day of October, 1871, as thirty-one per cent. of a sum equivalent to interest on the cost of investments made by the former company in the shares of the Salem and Lowell and Lowell and Lawrence Railroad Companies cast at the rate of seven per cent. per annum; and that, if necessary, the orators will move the court for leave to amend

their bill of complaint in order to embrace a claim for the recovery of these two sums.

Attest: JOHN G. STETSON, *Examiner.*

110 *Deposition of William W. Bailey.*

Direct examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

BOSTON, *Nov.* 19, 1884.

Int. 1. Please state your name and residence; and, if a director of the plaintiff corporation and the clerk of the directors of said corporation, how long have you held each of said offices?

Ans. William W. Bailey; Nashua, N. H. I am a director and have been since the annual election in May, 1874. I have been clerk of the board of directors since June, 1875.

Int. 2. Please look at the record of directors' meeting held May 28, 1872, containing a vote adopting rules, as shown in Exhibit 15, and state whether or not that meeting was a joint meeting of the boards of directors of each of the two corporations.

Ans. I suppose it was, and from the record I have no doubt of it.

Int. 3. Please look at the vote of directors of plaintiff corporation at a meeting held June 25, 1877, being same contained in Exhibit 8, and state whether that vote was communicated or made known by you to the directors of the Boston and Lowell Railroad Company.

Ans. It was my duty to do so under the vote, and I have no doubt I did it.

Int. 4. Whether or not it was the custom during the joint contract, since you became director, to hold meetings of the directors of both corporations, jointly or in common, once a month.

Ans. It was.

Int. 5. Whether or not at the meetings so held business was transacted by both boards of directors as if they composed the directors of a single company, and propositions were submitted and acted upon at the same moment of time and by single votes passed by the members of both boards voting together.

Ans. It was; the question being put by a common presiding officer to both boards at the same time. There were exceptions to this practice.

Int. 6. Do the records of these joint meetings, as kept by you, show the fact that the votes passed at such meetings were
111 participated in by the members of the Boston and Lowell board of directors?

Ans. They do not.

Int. 7. If such was the fact, why did not you, as clerk, make it appear in your record?

Ans. My duty was simply to record the action of the board of directors, of which I was clerk.

Int. 8. Whether or not there was in attendance at those joint meetings a clerk of the directors of the Boston and Lowell Corpo-

ration to keep a record of said meetings on behalf of that corporation.

Ans. There was at all joint meetings at which I was present.

WILLIAM W. BAILEY.

Attest: JOHN G. STETSON, *Examiner.*

EXHIBIT 15. J. G. S., Ex'r.

Interest on Investments Charged to Boston, Lowell and Nashua R. R. by the Boston and Lowell Railroad.

	Boston improvements.	Mystic River railroad.	Winchester depot.
Oct. 1, 1872	$20,013 27	$3,623 65	$700 00
April 1, 1873	26,093 29	4,705 75	700 00
Oct. 1, "	31,175 37	5,173 37	700 00
April 1, 1874	35,318 56	5,445 62	700 00
Oct. 1, "	41,277 63	6,155 05	700 00
April 1, 1875	42,009 28	8,110 15	700 00
Oct. 1, "	42,029 90	7,223 60	700 00
April 1, 1876	42,028 90	7,223 60	700 00
Oct. 1, "	42,029 90	8,045 86	700 00
April 1, 1877	42,000 46	8,045 86	700 00
	$363,977 56	$63,752 51	$7,000 00
Oct. 1, "	42,000 46	8,045 86	700 00
April 1, 1878	42,000 46	8,045 86	700 00
Oct. 1, "	42,000 46	8,045 86	700 00
Dec. 1, "	14,000 15	2,681 96	233 33
	$140,001 53	$26,817 54	$2,333 33
	$503,979 09	$90,572 05	$9,933 33
31 %	156,233 52	28,077 33	2,893 33

112

BOSTON, *Nov.* 26, 1884.

Present: Francis A. Brooks, Esq., of counsel for complainants; Josiah G. Abbott, Esq., of counsel for defendants.

Deposition of William W. Bailey Continued.

Cross-examination by JOSIAH G. ABBOTT, Esq., of counsel for complainants:

Cross-int. 9. Have you any means of knowing whether the meeting testified to by you in answer to Int. 2 was a joint meeting of the

directors of each corporation, except by examining the record of the plaintiff corporation?

Ans. I have not.

Cross-int. 10. Whether, while you acted as clerk of the plaintiffs' directors, you ever recorded a vote as passed by the plaintiffs' directors, unless you were satisfied it was passed and voted upon by a majority of plaintiffs' directors.

Ans. I never did.

Cross-int. 11. Whether, at all the monthly meetings of the plaintiffs' directors you have testified to, there were presented at those meetings a monthly statement of the receipts and expenditures of the joint corporations, and containing an apportionment of the shares of the receipts of each of the corporations.

Ans. It was the practice to present such a report at all the regular monthly meetings, and I do not recollect any such report that did not contain the apportionment referred to.

Direct examination resumed:

Int. 12. In reference to Int. 9 and your answer thereto, please look at the record of the directors' meeting held July 23, 1872, now shown you, in which I find this language:

"The manager reported that a discrepancy existed between the records of the Boston and Lowell and of the Nashua and Lowell roads as to the committee authorized to sign the contract of the Middlesex Central railroad, and it was—

Voted to amend the records of this board of May 28,
113 1872, by substituting the name of Edward Spalding in place of the name of Henry Sigourney on the committee for executing the Middlesex Central railroad contract."

Whether or not this meeting of May 28, 1872, is the same referred to in your second answer; if not, how otherwise.

(Objected to as incompetent and leading in form.)

Ans. I suppose it must be, as they are of the same date.

Int. 13. Whether or not more than one directors' meeting was held May 28, 1872, so far as appears by the records.

Ans. I do not find from the records that there was more than one meeting held on that day, May 28, 1872.

Cross-examination resumed:

Cross-int. 14. Have you any personal knowledge in reference to your two last answers, and is not your knowledge upon that subject entirely obtained from an examination of the records of the directors of the plaintiff corporation?

Ans. I have no personal knowledge in regard to those last two answers, and my knowledge is so obtained.

WILLIAM W. BAILEY.

Attest: JOHN G. STETSON, *Examiner.*

114 *Evidence for Defendants.*

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me, John G. Stetson, examiner.

Present: Francis A. Brooks, of counsel for complainants; J. H. Benton, Jr., Esq., and A. A. Strout, Esq., of counsel for defendants.

Deposition of Josiah G. Abbott.

Direct examination by A. A. STROUT, Esq., of counsel for defendants:

BOSTON, *July* 8, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Josiah G. Abbott; over sixty; Wellesley, Mass.; lawyer; office in Boston.

Int. 2. Were you at any time connected with the Boston and Lowell railroad; and, if so, when and in what capacity? State fully.

Ans. I was. I was director from, I should say, about 1857 until 1885. The last three or four years I was president of the road. Since January I have held no office, and hold no stock in the road.

(Adjourned.)

JULY 10, 1885.

Int. 3. Do you recollect the time when the contract between the Boston and Lowell Railroad Corporation and the Nashua and Lowell Railroad Corporation, dated Feb. 1, 1857, for the joint operation and management of said railroads, went into practical operation?

Ans. I recollect it perfectly well. It went into operation either at the time of or immediately after its date.

Int. 4. Please state what lines of railroads at that time were operated under said contract.

Ans. The Boston and Lowell and Nashua and Lowell. I am not certain whether the Salem and Lowell and the Lowell and Lawrence were operated under it at first; and, if not, they were taken on soon after, as also the Wilton and the Stony Brook. I think the two latter were in the original contract.

115 Int. 5. Please state between what points said railroad was situated.

Ans. Boston and Lowell, between Boston and Lowell, and also a branch to Woburn; the Nashua and Lowell, between Lowell and Nashua; the Lowell and Lawrence, between Lowell and Lawrence; the Salem and Lowell, between Salem and a point between Lowell and Lawrence, I think at Tewksbury; the Wilton, between Nashua and Wilton, in New Hampshire, and the Stony Brook, between North Chelmsford and Groton Junction. The Boston and Lowell was about twenty-six miles long, independent of the Woburn Branch; the Nashua and Lowell was about fifteen miles long; the Lowell

and Lawrence, I think, thirteen miles; and the Salem and Lowell, sixteen miles; and the Wilton, from thirteen to fifteen miles, and the Stony Brook, about fourteen miles long.

Int. 6. How long did the joint management and operation of these roads continue?

Ans. They continued the whole length of the contract—twenty years, I think, and my impression is a little longer, by mutual consent, without any formal or written agreement by either party.

Int. 7. During this time, state whether the traffic over said roads increased or diminished, and give your recollection of the same fully.

Ans. As a rule, it largely increased during the whole time. There may have been some six months when from peculiar causes there was no increase, but, as a rule, there was an increase. The yearly reports required by law will show the increase during that time.

Int. 8. State what other railroads were added to said system under joint operation during this time.

Ans. I think the Salem and Lowell and Lowell and Lawrence were added very soon after the making of the contract. The Stoneham Branch railroad was purchased by the Boston and Lowell railroad and added. The Peterboro' road was leased by the Nashua and Lowell road and added. The Lexington or Arlington was purchased by the Boston and Lowell and added, and a new road built from the main track of the Boston and Lowell to connect with the Arlington or Lexington road and added. The Middlesex railroad was leased by the Boston and Lowell railroad and added.

116 Int. 9. State what effect the addition of these roads and the general growth of business had upon the traffic coming into Boston over said railroads, as to its volume.

Ans. From all the causes operating there was a much larger volume of business coming to Boston and going from Boston over the Boston and Lowell than there had been previous to the contract, and that volume of business increased from year to year, though there may have been years in which it didn't increase.

Int. 10. Where were the main terminals for the principal traffic over these roads?

Ans. The main end of it all was Boston, from a great variety of sources.

Int. 11. At the time when said contract was made, please state what terminal facilities existed at Boston for the carrying on of the business of said roads.

Ans At the time of the contract there was a passenger station on Causeway street not fully completed. At the commencement of the contract there was a passenger station, used for a short time, at the foot, I think, of Lowell street. The provision in the contract, article 6, was that the new station should be completed at the expense of the Boston and Lowell railroad. It was so completed, and very soon after the signing of the contract the whole passenger business of the roads was transacted at the new station. The freight business was done at the freight station, near the old passenger station in Boston, and also across Charles river at East Cambridge.

Int. 12. At that time were there any facilities at Mystic wharf for doing the business of said roads or was there any railroad built to said wharf?

Ans. There were no facilities at Mystic wharf and no railroad was built from said Boston and Lowell railroad to said wharf.

Int. 13. How long did the roads use the old passenger station existing at the time of the inception of the contract, and what became of it?

Ans. They used it a very few months, and it was then turned into a freight house.

Int. 14. Whether or not the new passenger station was completed within the year 1857, and how long did its use continue as
117 such, and what became of it. State all the facts connected with it.

Ans. I have no doubt it was completed in 1857. It was used from ten to fourteen years, until the present new passenger station was built and used. It seems, by referring to a letter of the manager, that the new station was opened in November, 1873. Very soon after the first Causeway-street station (the one referred to as being nearly completed at the time the contract was made) began to be used it was found not to be large enough to accommodate the increasing business of the two roads. Within a few years of its first occupation it was found necessary to take down and remove a block of brick dwelling-houses belonging to the Boston and Lowell railroad, I think on Billerica street, and in the rear of the station, and to turn the ground occupied by them to the uses of the station, by building a shed from the end of the brick station, for train purposes. That was found very soon to be insufficient for the purposes of the increased traffic, and the subject of increasing the station accommodations and conveniences was a matter of very frequent discussion between the directors of the two roads, the Boston and Lowell and the Nashua and Lowell. These discussions finally terminated in a petition to the Legislature, by the Boston and Lowell Railroad Corporation, for authority to take additional lands for a new and larger passenger station. On this petition an act was passed May 19, 1869, granting the authority asked for. This act authorized the building of a new station in connection with the eastern railroad; but the directors of the two corporations, the Boston and Lowell and Nashua and Lowell, finally concluded that it was for the interest of the two roads that the new station should be built by the Boston and Lowell independently of the Eastern railroad, and land was taken under the act for a larger and new station, and the new station was built. The old station was taken down, and the new station was built on the land where the old station stood and on additional land.

Int. 15. State some of the difficulties found in making up trains and accommodating passenger traffic in this old station.

Ans. I can't state the details of the difficulties. I can only state that it was reported from the manager and superintendent to
118 the directors, and they believed the statement to be true, that even after the extension of the station it was wholly insufficient to accommodate the passenger traffic of the roads.

Int. 16. Was this the joint manager who so reported and were the facts brought to the attention of the directors of the Nashua and Lowell railroad?

Ans. He was the joint manager of both roads, and the reports were made by him and the superintendent to the directors of both roads, and the discussion thereon was between the directors of both roads.

Int. 17. After the making of said contract, state whether a portion of the business over said roads, terminating in Boston, came from beyond Nashua, and was through business from the West, over Vermont, New Hampshire, and Canadian railroads. If yea, state what proportion of said business was through business, as nearly as you can now recollect, and to what extent, if at all, said through business increased or decreased during the term of contract.

Ans. A portion of the business was from beyond Nashua, north and west of Nashua. That business increased largely after the execution of the contract, but what proportion it bore to the whole business I am unable to state. I will state this, that it bore a large proportion.

Int. 18. State any other fact connected with the making of said contract in relation to through freight and passenger business.

Ans. Just previous to the making of the contract some of the directors of the Boston and Lowell railroad had great doubts whether any business beyond Lowell was profitable. The whole matter of the profit of business beyond the terminus of the Boston and Lowell road was examined by members of the board, and the result of that examination was one of the reasons for the making of this contract, and from the time of making that contract great attention was paid by the manager of the joint roads to fostering and increasing the business from beyond the terminus of the two roads.

Int. 19. State whether or not the accommodations in Boston, at and before the building of the present depot and wharf, were sufficient to do the increased freight business of the two roads and their connections; and, if yea, specify the particulars.

119 Ans. Very soon after the execution of the contract it became apparent that greater facilities were required for the freight business of the joint roads, and the obtaining such increase of facilities was a matter of frequent discussion between the directors of the two roads. Some increased room was obtained across the Charles river at East Cambridge, and the manufacturing company's storehouses and wharves on Lowell street, I think, in Boston, were purchased by the two corporations for the purpose of increasing freight facilities. The purchase was made, I think, about thirty-one per cent. by the Nashua and Lowell and sixty-nine per cent. by the Boston and Lowell railroad. The Mystic wharf property, at that time in Charlestown, now in Boston, was also purchased by the two corporations in the same proportion, for the same purposes. The franchise of the Mystic River railroad was also bought by the Boston and Lowell, and the railroad built by said corporation to connect its main track with the Mystic wharf property. At one time for a few years—can't tell how many—a contract was made by the man-

agers of the two corporations in behalf of the corporation to use the Grand Junction railroad for the same purpose. A variety of additions to increase the freight facilities were added from time to time; it was considered, of course, that all these were necessary to accommodate the increase of freight.

Int. 20. State whether, as matter of fact, these additions were required to properly accommodate the freight traffic over these several roads and the connection therewith.

(Objected to because, professing to ask for matter of fact, it asks for an opinion.)

Ans. My belief and opinion is that these were necessary and required. That belief and opinion is founded partly on my own observation, but more from a careful examination and consideration of the reports made by the managers of the joint roads and the superintendent from time to time, and complaints were made by both those officers of the freight facilities, which we were obliged to examine.

Int. 21. To whom were such complaints and reports made?

Ans. They were made frequently to the directors of both corporations, and also frequently to me personally, as I supposed,
120 for the purpose of giving me the fullest information with reference to the wants of the road.

Int. 22. State whether or not you acted at any times prior to the building of the present depot and terminal freight facilities, in conjunction with Mr. Crowninshield or any other director of the Nashua and Lowell railroad, as a committee to act in relation to said freight and passenger terminal facilities in Boston; and, if yea, state what examination you made as such committee.

(Objected to unless it appear by matter of record, and not by parole, that the witness was duly appointed a committee, for the purposes inquired for, by vote of the directors of said corporations or of one of them.)

Ans. I cannot tell whether I acted as committee man without examination of the records; I think I did. The whole matter of the passenger and freight depots and facilities was very frequently discussed by the directors of both corporations before any change was determined upon and during the building of the new station, and changes made with reference to the freight facilities; and I can say, as far as I recollect, and I am sure I am right in my recollection, that the course taken in building the new passenger station and making the changes for increased freight facilities was agreed to and assented to by every director of each corporation, and that everything done in reference to the new passenger station and the increased freight facilities was by the unanimous consent and direction of all the directors of both corporations. I do not think that the records of either corporation will show but a very small record of them—of these frequent discussions between the directors of the two corporations. I can only say that if there was any objection

to the new passenger station or the increased freight facilities from any member of either board of directors I never heard it.

Int. 23. State whether or not the action of the Boston and Lowell railroad in relation to the rejection of participation by the Eastern railroad in building a passenger station was discussed and assented to by the directors of the Nashua and Lowell railroad.

Ans. It was. I recollect particularly the discussion and the part I took in it and the assent of the directors of both roads, especially of the Nashua and and Lowell railroad.

121 Int. 24. Whether or not, among other improvements made by the two roads for freight facilities, during the continuance of said contract, a grain elevator was built in Boston; and, if yea, at what cost?

Ans. There was a grain elevator built upon the property purchased from the manufacturing corporations referred to before that cost, I should think, about $75,000; am not sure about that. There was also an elevator built just before the expiration of the contract, on Mystic wharf, on the lands belonging to both corporations.

Int. 25 (*de bene*). I find in the record of the doings of the directors of the Nashua and Lowell railroad, under date of Jan. 24, 1871, the following: "The manager submitted and read an estimate of cost of the proposed new station-house in Boston, and presented plans of the same." State to what station-house this referred, and what your recollection in relation to the acts of the directors of the Nashua and Lowell railroad is on the subject.

(Objected to because the question is framed on the assumption of a state of facts which does not exist, and because there is no competent evidence of any such record as is by the question imputed to the directors of the Nashua and Lowell railroad; also because it does not appear that the witness was one of the directors of said corporation at the time or was present at said meeting of Jan. 24, 1871, or has any means of knowing what took place at said meeting, if any such meeting was held; also objected to the last part of the question that the acts of directors of Nashua and Lowell railroad are only capable of proof by written or record evidence, and not by parol testimony.)

Ans. I have no particular recollection, of course, of the precise meeting referred to, but at very many meetings of the directors of the Nashua and Lowell railroad, held at the same time and room as the directors of the Boston and Lowell, plans of a new station were presented to the directors of both corporations, and estimates of cost of executing the different plans, and those plans and estimates were very frequently discussed by the directors of both corporations at their meetings, and I am quite sure that at least one member of the Nashua and Lowell railroad directors was one of the committee of the directors of both corporations upon the erection and building of the new station, and I think at least one member of the

122 Nashua and Lowell Corporation took more part and had more to say and do with reference to the passenger station than any other director of either board. I refer to Mr. Sigourney.

Int. 23*a*. From the time of the erection of said passenger station and the facilities to accommodate the freight traffic, to which you have testified, to the close of the contract of Jan. 29, 1857, did not the Nashua and Lowell railroad enjoy the benefit and advantage of these improvements and additions without interruption?

(Objected to for substance.)

Ans. Of course they did.

Int. 24*a*. If there was any difference in the enjoyment and use of these facilities during that time by the Boston and Lowell and Nashua and Lowell railroad, of if one of them had any other or different use than the other, state what it was.

(Objected to for substance.)

Ans. There was no difference in the use, and precisely the same use was made of the station and freight facilities as was had before the erection of said buildings.

(Adjourned.)

JULY 13, 1885.

Int. 25*a*. I call your attention to the matter of purchase by the Boston and Lowell Railroad Corporation of the majority of the stock of the Salem and Lowell railroad and the Lowell and Lawrence railroad and the interest allowed by the Nashua and Lowell railroad upon the purchase-money for the same. State your recollection in relation to the circumstances and facts connected with the same. State fully.

Ans. The proposition to purchase was first made by the manager of the joint roads, Gen. Stark, some months certainly before the purchase was consummated. I don't think anything appears upon the records with relation to the proposition until the purchase was made (that is my recollection of it), for the reason that it wasn't desirable for the matter to be known till it was fixed and determined. The matter of the purchase was discussed very fully by the members of both boards, and, I should say, generally by all the members of each board. There was a good deal of discussion with regard to it as to the almost necessity of purchase, as some regarded
123 it, and as to the price to be paid. In the course of the discussion the question of the charge upon the two roads came up, it being considered that the income from the stock—that is, the dividends upon the stock—would not pay in full the interest upon the sum to be paid for it. It was understood by all the directors, as far as I know, of both roads that the excess of interest on the purchase-money above the dividends should be paid by both roads in the proportion fixed by the joint contract for the division of profits. That was carried out, if I recollect right, by charging this excess of interest to running expenses. This sharing of excess, of course, was only to continue as long as the contract continued; but at that time, as far as you could gather from the discussion of the directors on both sides, the belief was entertained that the two corporations would always, in some form or other, be kept together. Indeed, I

think as early as that time, and even before that time, the proposition of obtaining authority to unite the two roads had been discussed and considered—the obtaining of the authority in New Hampshire principally; but when the purchase was determined upon by the directors a meeting of the stockholders of the Boston and Lowell railroad was called, I believe, on my objections to doing anything except by vote of the stockholders.

The meeting was holden and authority to purchase was given. The date of the meeting, as given in the paper before me, was Aug. 7, 1871, and I should say from memory that it was about that date. The purchase was made soon after that, and from that time for some years the excess of interest over the dividends from the stock purchased was shared by the two corporations in the proportion of the division of receipts or profits provided for by the contract. I should say, from my general recollection, that at the monthly meetings of the directors of both corporations, which were usually held at the same time and place, this sharing of the excess of interest on the purchase over and above the dividends was communicated to both boards and appeared in some form—I can't tell precisely how—on the monthly statements submitted by the manager to both boards.

After the purchase, which must have been substantially in 1871, I never heard from any director of the Nashua and Lowell road, although meeting them very frequently, the slightest ob-
124 jection in any way to this sharing of the excess of interest over dividends. I can't fix precisely when I first heard of any objection, but for six months, ending in September or October, 1875, I was in Europe, and it certainly was not until after my return that I heard the slightest lisp of objection to this sharing of excess of interest over dividends.

Int. 26. State whether or not this matter of payment of interest by the Nashua and Lowell road, as stated by you, was discussed by the members of the Nashua and Lowell board when they held their meeting, as stated by you.

(Objected to because the witness was not a member of the Nashua and Lowell board of directors, and could have heard only such discussion, if any, as took place in the joint meetings of the two boards, where he was in attendance as a director of the Boston and Lowell road.)

Ans. I recollect no special and particular meeting and have testified of none. This whole question was considered and discussed at meetings of the two boards, which were held once a month at the same time and the same place; and when I say that the matter of sharing the excess of interest on the purchase over dividends was discussed perhaps that is too strong an expression, because from the first it seemed to be accepted as a matter about which there could be no question by all the members of each board that if the purchase was made the excess of interest over dividends should be shared by the two corporations, as before stated, so that, in fact, but little discussion could be held with reference to a matter about which no question was made, so far as I know, from the beginning.

Int. 27. State your recollection in relation to the purchase of land and building of station at Winchester, and state what facts existed in relation to the necessity of the purchase for the interest of both roads, and what was done in relation thereto. State fully.

Ans. My recollection in relation to the Winchester purchase is not so clear as in relation to the building of the station-house at Boston and in relation to the purchase of stock, as it was comparatively a small matter. I recollect generally that there was considerable discussion, covering a considerable length of time, about the old station and the moving of it at Winchester. I know the matter was
125 discussed by members of both boards equally, and I know the conclusion arrived at by all, without any exception, as far as I recollect, was that the interest of the roads required a new station. After this conclusion was arrived at, that there should be a new station, it was waited for some time, as I recollect, on account of a difference of opinion, to say the least of it, among the people of Winchester as to the place where it was to be built. We finally were obliged to fix the place without the people agreeing upon it. There were, in connection with this subject of a new station, questions arising from the amount of tanning bark brought down from the upper roads which were considered and had a bearing upon the question of location and building generally of the new station, but what those questions were I do not now recollect and couldn't say, but I recollect the fact that they did exist. I never heard from any member of the board of directors of the Nashua and Lowell road any objection to sharing the interest on the cost of that station between the two corporations until after the fall of 1875; how soon after I cannot tell, although I think the sharing of such interest was made known to the directors of both corporations at their monthly meetings, and I think appeared in some form upon the manager's monthly statements to the boards.

Int. 28. State whether there was any difference in the use and enjoyment of these improvements at Winchester by said roads.

Ans. Of course there was none; both roads shared all the benefits that come from the new station at Winchester.

Int. 29. Calling your attention to the vote of July 23, 1872, found in Complainants' Record, pp. 81 and 82, state your recollection of the discussion by the members of the respective boards of said roads concerning the subject-matter of said vote at any time prior to its passage. If any other proposition relating to the settlement of the cost of said improvements was considered, please state what it was. State fully.

Ans. It can hardly be said that there was ever any discussion between the members of the two boards of directors as to the Nashua and Lowell road sharing in the expense of erecting the station at Boston, for from the time that subject was first considered until later than the fall of 1875, certainly, it never was suggested
126 in any form or manner by any member of the Nashua and Lowell railroad that that corporation was not to contribute its share to the additional expense of building the station and of the other terminal facilities that I have testified about at Mystic wharf

and the Mystic River railroad. The whole matter of the new station and the other terminal facilities was based on the understanding that both roads were to share in their expense during the continuance of the contract, and I can say, as far as I am concerned and I believe, from my knowledge of my associates, that the question of erecting a new station at Boston and obtaining the other terminal facilities would not have been entertained for a moment, during the continuance of the joint contract, except upon the basis of the expense being shared by both corporations during the continuance of the joint contract. The only question that was ever raised by any member of either board of directors was as to the manner of sharing the expense. It was proposed at one time, and somewhat discussed by one member, certainly, of the Nashua and Lowell railroad board, and I think others, that the Nashua and Lowell railroad should own thirty-one per cent. of the new station in Boston. This course had been taken in the purchase of the manufacturing company's wharfs and warehouses in Boston, and also of the Mystic wharf property, and I objected, on behalf of the Boston and Lowell Railroad Company, that, although probably the two corporations would in some form be always united, still that we couldn't be sure of that fact, and for that reason I never would consent, for one, that another corporation should own, as tenants in common with us, our main station in Boston. This was assented to by the Nashua and Lowell directors, and the proposition of joint ownership abandoned.

The sharing of expenses of the new station between the two corporations was never objected to by any member of the board of directors of the Nashua and Lowell Railroad Company until after the fall of 1875, although in the other cases the sharing of the interest upon the expense of such new station was commended to both boards of directors at their monthly meetings, and, I think, appeared upon the monthly statements of the manager of the roads in some form—I can't say what.

Int. 30 (*de bene*). State where, after the making the contract,
127 the meetings of the boards of directors of the Boston and Lowell railroad and of the Lowell and Nashua railroad were usually held.

Ans. The meetings of both boards were usually held at the station-house in Boston of the Boston and Lowell railroad, and usually in the same room and at the same time, and were usually presided over by Mr. Crowninshield, who was president of each corporation. The clerk of the directors of each corporation was present to record the doings.

Int. 31. State where the two boards were accustomed to sit when these meetings were held and how votes were put and recorded at those meetings. State fully.

Ans. Both boards sat at the same table, at the meetings when both boards were present. Mr. Crowninshield was president of both corporations until after 1875, certainly. The president sat at one end of the table and the clerk of the Boston and Lowell railroad sat beside him. On both sides of the table next to the president sat the directors of the Boston and Lowell railroad. At the end of the

table, opposite the president, sat the clerk of the Nashua and Lowell directors, and the directors of the Nashua and Lowell road sat next to him, on each side of the table. All questions were put to both boards by the president of both boards, Mr. Crowninshield. All questions in which there was any, or could be any, supposed separate interest or liability of the two corporations were put by the presiding officer, first to one board and then to the other board. Questions growing out of the execution of the contract and bearing reference merely to the contract—such, for example, as purchase of more rolling stock for operating the joint roads under the contract, and questions of a like character—were put to both boards jointly, but I think no different questions were so put—no questions in which there was a separate interest or separate liability in the corporations. I feel sure of this because very early after the execution of the contract the president, Mr. Crowninshield, consulted with me in reference to the method of proceeding, and I feel sure that when I was present no other course was taken.

Int. 32. State whether each of said boards had its separate clerk and kept its separate record of its separate action.

(Objected to because this can only appear from the records themselves.)

128 Ans. Each board had its separate clerk. Each clerk, I suppose and believe, kept a separate and independent record of the doings of its board. Such a course was the result, I suppose, of the conference between Mr. Crowninshield and myself, as we both came to the conclusion that the proceedings of the directors of each corporation should be kept by the clerk of each corporation separately.

(Last part of answer objected to.)

Int. 33. After the passage of the vote of July 23, 1872, state whether the two railroads settled and adjusted from time to time their accounts in conformity to the provisions thereof.

(Objected to as provable by writing only.)

Ans. After the passage of that vote, certainly, monthly statements were always made by the manager of the roads to the joint meetings of the directors of the two roads, and in those statements, as I recollect it, it appeared in some form that the expense of those different improvements that I have been testifying about was shared by the two corporations. Those statements were accepted by the directors of each corporation, unless some question was made as to some portion of the statement. My impression is that the records show that these statements were accepted by each corporation. At the end of each six months, or as soon thereafter as the accounts for the six months could be made up, the account of the business of the six months was presented to each board, showing, as I recollect, the net share of each corporation in the profits for the six months, which was also based upon the sharing of the expense by the two corporations of those improvements which I have testified about,

and which were received and assented to by both boards of directors, so far as I know; at any rate, I never heard of any objection from any source, certainly until after 1875.

Cross-examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

Cross-int. 34. At the time of the date of the joint-traffic contract (1857) was not the capital stock of the plaintiff corporation $600,000, and that of the defendant corporation $1,830,000? If not, how otherwise was it?

(Objected to as irrelevant and as not calling for the best evidence.)

129 Ans. I should say that those are about the amounts of the stock of the two corporations, and from a book shown me I find that those are the amounts.

Cross-int. 35. At the expiration of the joint contract in 1878 was not the capital stock of the Nashua and Lowell Corporation $800,000 and the capital stock of the Boston and Lowell Corporation $3,250,000?

Ans. I believe those to be the amounts of the capital stock of the two roads.

Cross-int. 36. I find that the ratio of the capital stock of the corporations, including the capital of the Wilton as part of the Nashua road, in the inception of this contract was, as nearly as possible for even sums, the same as that adopted in the joint-traffic contract for the division of earnings—that is, that the capital of the Nashua and Lowell and Wilton amounted to thirty-one per cent. of the joint capital at that time, and the Boston and Lowell amounted to sixty-nine per cent. of that joint capital. Whether or not this fact had anything to do with the ratio of dividing the earnings under the joint contract.

(Objected to as argumentative, introducing facts and statements not proven in the record, as irrelevant, and as cross-examination upon new matter not inquired of upon the direct.)

Ans. As far as I know, it had nothing to do with it. The first time, to my recollection, that I ever heard of that relation of the capital stock to the division of earnings is now stated to me.

Cross-int. 37. Was not the first passenger station of the Boston and Lowell on Causeway street, when taken down to give way to the new passenger station there, worth or valued at $400,000 or thereabouts?

(Objected to as irrelevant.)

Ans. I do not recollect. I should think the whole cost of the improvement, land and buildings, was at least that.

Cross-int. 38. Did not the new passenger station, now standing there, including land bought for this purpose, cost over $1,200,000?

(Same objection, and as new matter not inquired of in the direct.)

Ans. I, of course, know nothing of the cost of the building

except from reports made to me as one of the directors by the
130 manager. My recollection is that it was reported as costing over a million. I can't state more definitely than that.

Cross-int. 39. Did the directors of the Boston and Lowell Corporation, including yourself as one, in their annual report for the year ending Sept. 30, 1869, recommend that the corporation accept the act of the Massachusetts Legislature of May 19, 1869, above referred to by you, and also recommend that the directors of the Boston and Lowell be "authorized to locate and purchase or take land under the act whenever or so far as in their judgment the interests of the corporation will warrant, and to construct suitable buildings and terminal facilities thereon when satisfactory contracts relating thereto can be concluded with the adjacent or connecting roads?"

(Objected to as to last question, and also because the report referred to being in writing, is the best evidence and should be produced.)

I now hand you a printed copy of the report referred to.

Ans. By examining the report handed me it appears that we did so report to stockholders of the Boston and Lowell railroad, and gave the reasons for it in that connection that our grounds in Boston now provide a metropolitan terminus for about nine hundred miles of railroad, and the equipment of this great connected line amounts to about two hundred and twenty-five locomotives, one hundred and seventy-five passenger cars, eighty baggage cars, and five thousand freight cars. Our freight yards and houses are at present no more than ample to accommodate our large traffic thus brought to us, notwithstanding the great enlargement made in 1864, while our passenger stations and grounds are already wholly inadequate to the demands of the business. It is also stated that the business has doubled within the last ten years; this was in 1869. My recollection is that the reference in the report to satisfactory contracts being concluded with the adjacent or connecting roads had reference to the Eastern railroad as adjacent and to some contemplated effort to make the upper roads, as they were called—the New Hampshire and Vermont—pay some additional terminal charge for each passenger to and from Boston, but that was never carried into execution.

Cross-int. 40. Did not defendants' directors, you being one,
131 in their printed reports to stockholders for the year ending Sept. 30, 1871 (p. 9), use the following language?

"The steady annual increase of receipts would seem to warrant our confident expectations of being able to keep up full dividends and meet the interest upon the expenditures now making and to be made for permanent improvements and increased facilities at the Boston terminus."

I hand you herewith a printed copy of that report for your inspection and verification.

(Same objection as to last question.)

Ans. By examining that report it appears we did use that language. When the report speaks of meeting the interest upon the expenditures now making and to be made, I, for one, had in my mind the proportion of interest that we were to pay as long as the contract between the two roads continued, because, as I have stated, at that time I never had heard a suggestion from any source that the interest on those investments should not be shared by the two corporations as long as the contract continued.

Cross-int. 41. Did not defendants' directors, in their printed annual report to the stockholders for the year ending Sept. 30, 1874, when speaking with reference to the contract relations of defendant company with the plaintiff corporation, use the following language?

"The Boston and Lowell puts in its main road with its Mystic, its Woburn, its Stoneham, and its Lexington Branches and its leases of the Lowell and Lawrence and the Salem and Lowell roads.

The Nashua and Lowell puts in its main road and its leases of the Stony Brook, the Wilton, and the Peterboro' roads."

(Objected to as before.)

Ans. By looking at that printed report I find they did use that language.

Cross-int. 42. Were you at any time one of the directors of the Nashua and Lowell Corporation?

Ans. I never was.

Cross-int. 43. Were the monthly meetings of the two corporations during the joint-traffic contract at which you were present held for the transaction of joint business arising under that contract or chiefly so, and when business relating solely to separate interests of
132 either corporation was to be transacted were not separate meetings held for that purpose?

Ans. Monthly meetings were holden for the consideration of business arising under the contract and for the transaction of other business when the interests or liability of either road might be separate and distinct. What the course of the Nashua and Lowell as to separate meetings was I cannot tell; but, as far as I now recollect, separate meetings of the Boston and Lowell road were holden only for declaring dividends.

Cross-int. 44. Did not defendants' directors, in their printed annual report to stockholders for the year ending Sept. 30, 1877, use the following language?

"The two boards of directors, with a common president, held joint meetings, and for more than seventeen years there was perfect harmony," etc.

I hand you this report for verification.

(Same objections as before.)

Ans. By looking at the report I find they did so report, and I should desire to put in what follows as explanatory of the report.

(Adjourned.)

JULY 16, 1885.

Cross-int. 45. At the date of the defendants' annual report of 1871 (Dec. 15, 1871), had not the train-house of the new passenger station in Boston (530 feet long by 120 feet wide) been "put under contract and well advanced" in construction?

Ans. I can't say from any personal recollection of it. It seems to be so stated in the report of the directors for the year 1871.

Cross-int. 46. I now read to you from the Boston and Lowell railroad directors' report for 1871, bearing the date Dec. 15, 1871, above referred to, and now show you what precedes and follows the matter quoted in the fortieth question, the whole being in these words:

"The increased tonnage and greater number of miles run have added materially to the cost of operation; but we have been enabled to make the usual dividends, to provide for the increased in-
133 terest accounts upon investments in the new works, and to carry to the sinking fund and surplus account the accustomed balances.

"The steady annual increase of receipts would seem to warrant our confident expectation of being able to keep up full dividends and meet the interest upon the expenditures now making and to be made for permanent improvements and increased facilities at the Boston terminus."

There follows at the bottom of page 6 of this report a statement of the manner in which the funds of defendant corporation had been employed or invested, and a statement in these words:

"Invested in branch roads, $775,462.46; invested in Boston improvements, $293,758.99."

Does it not appear from all these extracts that the Boston and Lowell Corporation had itself provided for the increased interest accounts upon investments in "new works" down to Dec. 15, 1871, including the Boston improvements, interest account on an outlay of $293,758.99, and branch roads costing $775,462.46; also that the directors expected to be able to do the same in future out of the increased earnings?

(Same objection as to cross-int. 36.)

Ans. The statement of accounts, I think, only extends to Sept. 30, 1871. The examination of the statement will speak for itself, and I can't add anything to what will appear from the examination. I should think from the reading that the extracts were correctly quoted in the question.

I can only answer with absolute certainty as to my own expectations, but from conversations very frequently had with my associates I have no doubt they agreed with me. I never expected or had the slightest suspicion from the beginning that in fact the interest on the investment in the new station-house, or the excess of interest on the cost of purchase of stock before referred to over the dividends received from the stock purchased, was not to be shared by the

Nashua and Lowell Railroad Company. From the time the subject of a new station was first suggested and the purchase of stock was first brought to our attention it was understood fully by the members of both boards of directors that during the continuance of the contract the liabilities for such station and such purchases
134 were to be shared by both corporations, and I never had any suspicion or expectation of any claim to the contrary, certainly until after 1875.

(Latter portion of answer objected to as not responsive.)

Cross-int. 47. Might not the conversation had by you with your associates, referred to in your last answer, have occurred after Dec. 15, 1871, when the report of 1871 is dated and purports to be signed by the Boston and Lowell railroad directors and all of them, including yourself? Have you any certain means of fixing the date of such conversation with certainty as previous to Dec. 15, 1871?

(Objected to as immaterial.)

Ans. I have no doubt such conversations occurred both before and after 1871. I am as sure as I can be of anything from recollection that substantially such conversations occurred from time to time as the subject-matter was brought to our attention from the very first discussion of the question of erecting a new station and of purchasing stock in the other railroad before referred to. I can also say that I think these conversations were with the directors or in the presence of the directors of the Nashua and Lowell railroad, as well as between the directors of the Boston and Lowell railroad, and I can say for one that I would not have entertained for a moment the proposition to expend large sums of money for a new station unless, during the contract, the expense was to be shared by the Nashua and Lowell railroad.

(Latter part of answer objected to as not responsive.)

I can't fix any particular times when these conversations took place, of course.

Cross-int. 48. In 1871, when this stock purchase was made by the Boston and Lowell Corporation, was it not beyond the lawful power of the Nashua and Lowell Corporation to make such a purchase or to use its corporate funds for this purpose, even if it had desired to do so? I mean had the Nashua and Lowell Corporation, by its charter or by the laws of New Hampshire or Massachusetts, then in force, any right to acquire by purchase a majority of the stock of the Lowell and Lawrence and Salem and Lowell roads, or either of them?

(Objected to because the distinguished counsel who is now testifying has received no retainer for giving his legal opinion
135 upon points which are for the sole decision of the court, and because the question is incompetent and immaterial.)

Ans. The question asks me for a purely legal opinion. As far as I am acquainted with the statutes of New Hampshire, I am of the

opinion that, by the laws of New Hampshire and of Massachusetts, the Nashua and Lowell railroad could not legally make a purchase of stock in a Massachusetts corporation at that time; but I am inclined to think that, in the position of the Nashua and Lowell and Boston and Lowell corporations and under the relations existing between them, if the Boston and Lowell Railroad Company purchased stock for the equal benefit of the business of both corporations which was to be shared under the contract and upon consideration of an agreement by the Nashua and Lowell Corporation to share a just and ratable proportion of the excess of interest over and above the dividends received from such purchase of stock, such an agreement would be binding on the Nashua and Lowell railroad during the continuance of the contract.

Cross-int. 49. Was it in 1871 legally competent for the Boston and Lowell Railroad Corporation to acquire by purchase and become the owner and holder of a majority of the capital stock in other railroad corporations, in Massachusetts or elsewhere?

(Objected to as incompetent and as asking the opinion of a witness on a question of law.)

Ans. This question, as the last one, asks for an opinion on a question of law. I can only say that at the time the purchase was made I was inclined to think, and so stated to my associates, that the directors had no legal power to make such purchase, and I therefore thought it proper, before any purchase was made, to have a meeting called of the stockholders and to submit the question to the stockholders, and if the stockholders with unanimity agreed to the purchase it would be the strongest evidence to my mind that no harm could be done to the stockholders, they consenting. The only other party that could object was the Commonwealth, and upon a question of that kind a corporation must take its risk of interference by the attorney general or the Legislature. As I recollect, the assent of the stockholders was unanimous; the matter was discussed, and I recollect no objection whatever; and for fourteen or fifteen years
136 the matter was fully known to the Legislature and the public, and no objection has been made on behalf of the law authorities of the State or of the Legislature or on behalf of the stockholders, which I think is, upon the whole, a justification of our proceedings.

Cross-int. 50. Was the fact of the purchase of this stock by the Boston and Lowell Railroad Corporation known to the public ever since it was made? Was such purchase made in the name of the Boston and Lowell Corporation or in the name of third parties acting in behalf of said corporation? Was not this method of purchase resorted to to avoid the danger of legal questions being raised as to the power of the Boston and Lowell to buy; if not, why was not the purchase made directly and in the name of the Boston and Lowell Railroad Corporation?

(Objected to as incompetent and immaterial.)

Ans. I have no doubt the purchase of stock was known to the public generally at the time of the purchase, as I recollect the pub-

lished notice in at least two newspapers of Boston of the call of the meeting of stockholders — designated the object for which it was called. The stockholders' meeting was a public one and quite largely attended. The question was quite fully discussed. I think, I am quite sure, I saw notices of the action of the stockholders in the public newspapers, and I think, by the returns to the Legislature by the directors, the fact of the purchase appeared within a year or two of the time of the purchase, and, as far as I know, no attempt was made or would have been tolerated by myself or my associates to keep the matter secret.

I think the stock was transferred to certain natural persons as trustees on the face of the certificate of stock, and a declaration of trust was also made and signed by the holders of the stock declaring the trust. I was a holder of a part of the stock myself. I am quite sure, and I should say as far as I recollect, that the reason for taking the stock in the name of a natural person as trustee was mainly that some question was raised about the manner of voting at stockholders' meeting, if the stock had been holden directly in the name of a railroad corporation, and it was admitted that if held in the name of a natural person the stock could be voted upon, as all natural persons, holders of stock, could vote at stockholders' meet-
137 ings. I have an impression also that there is something in our statute regulations about one holder not being able to vote on more than a certain number of shares, and that that had something to do with the matter of holding the stock; but I am not quite sure whether that regulation applies to railroad corporations or to some other corporations. If there were any other reasons for so holding the stock, I have forgotten them.

Cross-int. 51. Please look at the treasurer's balance-sheet for the year ending Sept. 30, 1871, printed at page 13 of the directors' annual report for 1871, and state whether on the debit side of this account there is not an entry in these words: "Trustees of Lowell and Lawrence and Salem and Lowell railroad stock, $299,388." Does not this entry refer to the transaction of the purchase of this railroad stock; if not, to what does it refer?

(Same objection as before.)

Ans. There is such an entry and I have no doubt it refers to the purchase inquired of in the question.

Cross-int. 52. Was it, in your opinion as a lawyer, any more legally competent for the Nashua and Lowell Railroad Corporation to subscribe or contribute any sum whatever towards the cost of constructing the new passenger station of defendant corporation at Boston, or to become a part owner of said station, or to render itself liable for any part of such cost, than it was to purchase a majority of the stock of other railroad corporations?

(Objected to as incompetent and immaterial. Counsel for defendants gives notice that he will move to purge the record by striking out from the testimony, before the same is published, this and all similar questions asking opinions as to matters of law.)

Ans. My opinion is that, under the then existing contract between the two corporations, if it was deemed necessary by the directors of the Nashua and Lowell railroad to increase the business under that contract and so increase the profits of the Nashua and Lowell railroad, that the means of accommodating increased business should be furnished, it was fully competent for said directors to agree that the interest upon the cost of such means of increasing the joint business should be borne by said corporation in proportion to its interest in the profits under said contract.

138 Cross-int. 53. Did you, when framing or drawing the vote of July 23, 1872, or do you now think it was consistent with facts or strict accuracy of expression to say or provide that interest on the cost of constructing the Boston and Lowell railroad, or any part of it, could under any circumstances constitute or be a part of the expense of operating the Nashua and Lowell railroad?

(Same objection, and because it does not appear from the testimony that Judge Abbott did draw the vote as is assumed.)

Ans. I presume the vote passed by the Nashua and Lowell railroad is the same as that passed by the Boston and Lowell railroad. I have no doubt I drew the vote which was passed by the Boston and Lowell railroad or that it was drawn under my supervision.

I thought then and I think now that it was just and equitable that interest should be paid to the Boston and Lowell railroad upon its expenditures for a new station at the current rate of interest at that time during the continuance of the contract, and I believed then and I believe now that it was just and equitable that said interest should be charged as a part of the expenditures of operating the two railroads and taken out of the gross receipts of the two railroads, for it was an expense which had been incurred for obtaining something that was necessary to obtain the largest returns and fullest benefits from operating said railroads under said contract.

Cross-int. 54. Was there ever any vote passed or other formal action taken by the two boards in joint session, or by the Nashua and Lowell board alone, upon this subject of interest contributions to be made by the Nashua and Lowell Corporation prior to the vote of July 23, 1872, above mentioned, so far as you know?

(Objected to as incompetent, the record being the best evidence.)

Ans. Of course I cannot be certain without an examination of the records, but I think no formal action was taken by the Boston and Lowell road certainly on that matter until the passage of the vote referred to in the last question. But, as I have before testified, this vote was merely carrying out the perfectly well understood agreements between the two boards of directors from the beginning. I think that vote, passed by the Boston and Lowell road certainly, was reported by me as one of a committee, but I am

139 not sure of it. I ought to state, also, that somewhere on the records of both boards I think there is a vote authorizing the payment of interest for improvements at Lowell to the Nashua and Lowell Corporation. At any rate, I am quite sure payment of such

interest was made to them out of the funds of the joint corporations.

(Latter part of the answer objected to as not responsive.)

Cross-int. 55. In your twenty-fifth answer you state that, so far as you know, nothing appears on record for charging the Nashua and Lowell Corporation with any part of the purchase-money of the railroad stock of the Lowell and Lawrence and Salem and Lowell roads, and that it was understood by all the directors of both roads that the excess of the interest on the cost of this stock (above the dividends realized therefrom "should be paid by both roads in the proportion fixed by the joint contract for the division of profits," and "that this understanding was carried out, if I recollect right, by charging this excess of interest to running expenses." Who originated the idea of providing in part for the cost of this railroad stock purchase by charging the interest of the amount paid therefor as expense incurred in operating the two railroads under traffic contract?

Ans. I cannot say with certainty. My impression is that Gen. Stark, the manager of both roads at that time, suggested it; but it was acquiesced in by everybody as a just and proper method of carrying out the understanding, so far as I know.

Cross-int. 56. You are probably aware that the Nashua and Lowell railroad directors, June 25, 1877, or thereabouts, passed the vote set forth in the bill of complaint (page 8), and that the manager refused to pay any heed to such vote, but continued to make up his monthly accounts of expenses as if no such vote had been passed, and to deduct large sums from the joint receipts as interest charges and to pay over the same to the Boston and Lowell Railroad Corporation as before under the vote of July 23, 1872. Did the manager have your countenance and support in this course, either as one of the Boston and Lowell railroad directors or otherwise?

(Objected to as incompetent, as making a recital to the witness of probabilities in the mind of the interrogator.)

Ans. I heard that at some time, I should think in 1877, the directors of the Nashua and Lowell railroad had passed a vote
140 in substance like that inquired about in the question. I did know that the manager of the two roads and the cashier continued to settle the accounts and make payments in reference to the station and other matters inquired about, as they had done up to that time, without any objection.

My impression is that that question never came before the board of directors of the Boston and Lowell road, but I certainly assented to that course by not objecting to it, and if my advice or assent had been asked I should not only have voted my assent, but should have voted to direct the manager to continue making the payments as before.

Cross-int. 57. Was not the Mr. Sigourney mentioned by you as a director in the Nashua and Lowell board, and now deceased, a larger stockholder in the Boston and Lowell road than in the Nashua and Lowell road?

(Objected to as immaterial.)

Ans. I do not know. I always supposed that he was a much larger stockholder in the Nashua and Lowell than in the Boston and Lowell road; indeed, I do not now recollect of hearing until this time the suggestion that Mr. Sigourney was a stockholder in the Boston and Lowell road at all.

Cross-int. 58. It appears that the first passenger station on Causeway street, in Boston, valued not less than $400,000, was torn down and the new station erected at a cost of not less than $1,000,000. Do you think any more passengers were carried over the road by reason of the rebuilding and enlargement of this station?

Ans. I think now and I thought then that by increasing the facilities of receiving passengers at the Boston station the number of passengers could be increased, and by such increased facility of receiving them to and from Boston I have no doubt the number was increased; but I think, in addition, if the wants of the public had not been met there would have been such dissatisfaction that the number of passengers would have been decreased.

(Latter portion of answer objected to as not responsive.)

Cross-int. 59. Did the passengers coming to these roads after the erection of the new Boston station pay any higher rates of fare than before, or were they charged any higher rates?

141 Ans. I do not recollect whether any higher rates were paid or not. I recollect very well the matter was discussed of obtaining agreements from the upper roads, as they were called, for a distinct terminal charge for each passenger, if a new station was built. Complaints were constantly coming to us from those upper roads as to the insufficiency of our facilities for taking their passengers, and the danger of losing business from those roads was one of the inducements for building the new station, as the Boston business could always be diverted to the Boston and Maine railroad.

(Latter part of answer objected to as not responsive.)

Cross-int. 60. When you state, in your answer 33, that the clerk of each board of directors "kept a separate and independent record of the doings of its board" do you mean to be understood to say that the record so kept by each did not embrace the proceedings or actions of both boards in relation to all business in which both were jointly interested, although the record of each clerk might be made up so as to purport to show only the doings of one corporation or one board of directors? Is it not true that the business transacted at these joint monthly meetings was for the most part business in which both corporations were interested jointly, and so far as the business transacted was joint business, if the two records were correctly kept, would it not appear from them that the same votes were passed by each board, when, as a matter of fact, such votes were passed by both boards acting jointly and not by each board acting separately?

(Objected to as calling for testimony to contradict the validity of the records of the complainant corporation and as incompetent.)

Ans. I cannot answer the question put more fully than I have already answered it in the direct examination, unless I should make a full examination of the records of both corporations. I have no doubt a good many votes having reference to the joint management under the joint contract were passed by the directors of both corporations acting together, and that those votes appear recorded as the votes of each corporation separately; but if in the taking of any of those votes it should have appeared that there was any objection on the part of any member of either board, I have no doubt then the vote would have been put separately to each board.

142 Cross-int. 61. Were not these regular monthly meetings of both boards, after 1870, if not before, held the latter part of the calendar month; and, if you were shown a record of directors' meetings of the Nashua and Lowell Railroad Corporation held at the manager's office in Boston the latter part of any calendar month (during the year 1872, for instance) would you not infer that a similar record might be found in the directors' records of the Boston and Lowell Railroad Corporation?

(Objected to as incompetent and asking the inference of the witness and not his recollection.)

Ans. As I recollect, most of the joint meetings were held the latter part of the month. If I had seen a record of the Nashua and Lowell directors of a meeting purporting to be holden the latter part of any month, at the manager's office in Boston, I should have drawn no inference that a meeting of the Boston and Lowell directors had been holden at the same time, unless I could recollect the holding of such meeting of the Boston and Lowell railroad, because I was informed and believed that separate meetings of the directors of the Nashua and Lowell railroad were from time to time holden at said office of the manager, not attended by the directors of the Boston and Lowell railroad.

Cross-int. 62. If you had seen a record of the directors' meetings of the Boston and Lowell Railroad Corporation holden the latter part of any calendar month, during the joint-traffic contract, at the manager's office in Boston, would you not have inferred that a meeting of the directors of the Nashua and Lowell Railroad Corporation was also held at the same time and place, unless informed to the contrary?

(Same objection as last.)

Ans. I should not necessarily have made such inference unless I recollected such joint meeting, or unless from the nature of the matter recorded I should infer that there had been a meeting of both boards. The Boston and Lowell directors had separate meetings from time to time.

Cross-int. 63. If it be true that it was the custom to hold joint meetings of both boards of directors the latter part of every month,

during the term of the contract, and if, as I understand you
143 to have stated, it was not the custom of the Boston and Lowell directors then to hold any other meetings, unless for the purpose of declaring dividends (see Ans. 43), except at the same time and place of the joint meetings, would it not be the natural and reasonable inference, whenever either board of directors were in session at the time of such monthly meetings, that both boards were in session?

(Objected to as incompetent and argumentative.)

Ans. If the records showed that the meeting was a regular monthly meeting I should infer that there was a meeting at the same time and place of both boards of directors.

Direct examination resumed:

Int. 64. Do you say that in order to fully answer Int. 60 it is necessary for you to make an examination of the records of both corporations, and does such an examination include the necessity of examining the records of the board of directors of the Nashua and Lowell Corporation during the time inquired of in said Int. 60?

Ans. I did state in the former answer that it was necessary to examine the records of both corporations, and such examination would, of course, include the records of the directors of the Nashua and Lowell railroad.

(Counsel for defendants now calls upon the counsel for the complainants to produce the records of the board of directors of the Nashua and Lowell Corporation for examination by the witness and for use in this case in connection with this deposition, counsel for defendants having admitted that said records were in his possession or under his control.

Counsel for complainants says, in reply to the very remarkable request just made by the counsel for the Boston and Lowell Corporation, defendants in this case, that he respectfully informs defendants' counsel that the answer of the defendants' own witness to Int. 60, put to him by complainants on cross-examination, cannot, as complainants' counsel thinks, be made the foundation to any claim on defendants' part to the production of the records of the complainant corporation, no such records being called for by cross-int. 60 or the
answer thereto, and if the defendants' learned counsel imag-
144 ines that he can require the production of records of plaintiffs' corporate meetings on any such a pretext as this he is in error.)

Int. 65. After the erection of the terminal facilities in Boston, including the railroad station, freight facilities on Mystic wharf, and the Winchester station, did not the upper roads, including the Concord, B., C. & M., Northern and Vermont Central, pay for the advantage of such facilities terminal charges amounting to about thirty cents per ton, and did not the Nashua and Lowell railroad receive its thirty-one per cent. of such payments?

(Objected to as new matter and not in reply to cross-examination.)

Ans. A terminal charge was made to the roads named in the question and to several other railroad corporations, as far as I can recollect, of thirty cents a ton on freight, and that thirty cents was divided in the proportion named with the Nashua and Lowell Railroad Company during the time of the contract.

Cross-examination resumed:

Cross-int. 66. Was not a like terminal charge for handling freight at Boston of some amount made against the upper roads, so called, long before the erection of a new station and other works, called Boston improvements, and were not such charges paid?

Ans. Such charges were no doubt made and paid. The amount of such charges was comparatively small—that is, small as compared with the charges after the improvements were made—because, until the facilities for receiving freight were enlarged, as I have testified, it would have been impossible to have done the amount of business that was done after such enlargement. The amount of charge per ton was the same before and after the enlargement of the facilities, as I recollect.

J. G. ABBOTT.

Attest: JOHN G. STETSON, *Examiner.*

145 *Deposition of Daniel S. Richardson.*

Direct examination by A. A. STROUT, Esq., of counsel for defendants:

BOSTON, *Aug.* 4, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Daniel S. Richardson; sixty-eight; Lowell, Mass.; lawyer.

Int. 2. Were you at any time connected with the Nashua and Lowell Railroad Corporation; and, if yea, in what capacity?

Ans. I was a director a great many years, I think commencing before 1857; I was president of the road one year, I think, in 1876 or 1877, or part of each. I think I ceased to be a director in 1878 or 1879.

Int. 3. Do you recollect the fact of the contract between the Boston and Lowell Railroad Corporation and the Nashua and Lowell Railroad Corporation, dated Feb. 1, 1857, and the fact of the joint operation and management under the contract of the two roads?

Ans. I recollect the fact of the contract and the joint operation, but I don't recollect the exact date; it was about that time, I should think.

Int. 4. How long did the joint management and operation of the two roads continue under that contract, according to your best recollection?

Ans. I think the contract provided for a continuance of twenty years, and that the joint operation continued during the time of the contract and a little while longer.

Int. 5. During the time these roads were operated together, state your recollection of the condition of the passenger and freight traffic over the roads, as to its being increased or diminished from year to year. State your recollection fully, and the causes which led to the increase, if there was such.

Ans. I can't give any very definite particulars. My impression is that both the freight and passenger traffic increased very considerably, but perhaps not always regularly, and I remember that among the directors there used to be talk of the need of additional accommodations therefor from time to time. I should think
146 that the causes were the general increase of local business as well as through business.

Int. 6. Whether or not, after the making of said contract, the two roads added other railroads, such as the Stoneham Branch, the Peterboro', the Lexington and Arlington, and the Middlesex?

Ans. They did.

Int. 7. What was the effect of such additions upon the increase of travel and the necessity of additional accommodations therefor at the Boston end of the railroad?

Ans. I should say they increased travel, and required additional accommodations.

Int. 8. At the time of making this contract were there any facilities or connecting railroad for reaching Mystic wharf to accommodate the joint business of both roads?

Ans. Not that I am aware of.

Int. 9. Was the present Boston and Lowell passenger station and train-house built when said contract was made?

Ans. It was not.

Int. 10. Describe the passenger station, as near as you can, that existed at Boston at the time of making this contract.

Ans. There was an old station at the foot of Lowell street, and after that a new station was built on or near Causeway street and the old station was turned into a freight station, but I can't tell the time exactly, in relation to the date of the contract, when the old station was abandoned and the new station came into use.

Int. 11. As the freight passenger traffic of the two roads increased, as testified by you, what was the fact as to the sufficiency of the then existing facilities to accommodate the traffic of the two roads and their additions?

Ans. I think they soon became insufficient properly to accommodate them.

Int. 12. What steps were taken by the directors of the Nashua and Lowell railroad and the directors of the Boston and Lowell railroad to remedy this want of sufficient terminal accommodations? State your recollection about it as nearly as you can.

(Objected to because whatever action was taken for that purpose by the directors of the two or roads of either corporation must
147 have been matter of record and not capable of proof from recollection of the witness.

Counsel for defendants states that he offers the testimony as the

best secondary evidence in his power, counsel for complainants having declined to produce the records of the corporation in his possession after being duly notified to produce the same.)

Ans. My recollection is that the Boston and Lowell built the present station, giving much enlarged accommodations for passengers, and I think the storage houses of the Lowell companies were bought by the Nashua and Lowell and the Boston and Lowell here at the Boston end, and I think the two companies bought the Mystic wharf, and a track was laid connecting the Boston and Lowell with that wharf.

Int. 13. State whether or not such additional accommodations, in your judgment, at the time of building, were necessary for the accommodation of the joint traffic of the roads, and whether, as a director of the Nashua and Lowell Railroad Corporation, you assented thereto.

Ans. I thought so at the time, from the knowledge and information I had and from the probable growth of business, and I was favorable to them.

Int. 14. Who was the joint manager of the two roads at the time when such additional facilities were built?

Ans. Gen. George Stark.

Int. 15. State whether or not, prior to the building of the present existing station in Boston by the Boston and Lowell railroad, and the purchase of Mystic wharf, and the construction of the bridge over Charles river, and the other improvements in Boston made for the accommodation of the traffic of the two roads and their connections, plans in connection therewith were laid before the board of directors of the Nashua and Lowell Railroad Corporation and reports and suggestions in connection with said plans were made by Gen. Stark for the consideration of the board. State your recollection fully.

Ans. I can say that before the depot was erected plans were exhibited by Gen. Stark and explained by him. I can't state the exact times.

Int. 16. State whether the plans and propositions for these
148 increased terminal facilities were the subject of talk and discussion by the members of the Nashua and Lowell board of directors before their erection.

Ans. I think they were often talked over by the members of both boards and considered at their joint meetings.

Int. 17. Were they also talked over by the members of the Nashua and Lowell board of directors amongst themselves and by different members of the board?

Ans. The meetings were generally joint, and I don't remember, as to separate meetings particularly, what was done about it there.

Int. 18. Was there any dissent on the part of any member of the board of Nashua and Lowell directors to what was finally done in erecting these terminal facilities?

Ans. I do not remember any dissent whatever from any director of that board previous to that time.

Int. 19. Whether or not the different steps taken in acquiring land and in making the erections for these terminal facilities in Boston were known to and from time to time presented to the directors of the Nashua and Lowell railroad.

Ans. My impression is that the directors of the Nashua and Lowell railroad kept very well posted up in these matters.

Int. 20. Whether or not from time to time committees were raised to consider the subject of these terminal facilities and make reports thereon, and whether or not the directors of the Nashua and Lowell railroad participated in making up such committees.

(Objected to as not a subject of parol evidence.)

Ans. My memory is that such committees were appointed to act or advise in some way, and from both roads, but I can't give any particulars now that I think of.

Int. 21. After the making of the contract, state whether the business over both roads terminating in Boston or a portion of it came from beyond Nashua, and was through business from Vermont, New Hampshire, Canada, and the West which came over the northern railroads to both roads and so through to Boston.

Ans. My best information is that a great deal of business came to the joint roads from beyond Nashua, and much of it was through business over other railroads from long distances.

149 Int. 22. Now, after the time of the erection of the new passenger station now existing at Boston and the erection of the terminals at Mystic wharf was there any difference in the enjoyment and use of them by the Boston and Lowell and Nashua and Lowell railroads, or did they make precisely the same use of them, so far as you know?

Ans. I don't remember any difference in use of them; I think they used them together for their joint business.

Int. 23. I call your attention to a vote found in complainants' bill, Record, page 6, as follows:

"Voted, That the expenditures made and to be made by the Boston and Lowell Railroad Company for land and buildings in Boston for a new station and the expenditures made and to be made by said corporation for the building and completing the Mystic River railroad and for the improvements in Winchester for a new station and land for railway purposes to the amount of $20,000 are to be treated, in the management of the business under the joint business contract existing between said corporation and the Nashua and Lowell Railroad Company, as follows, viz: The said Boston and Lowell Railroad Company are to be paid the interest upon such expenditures made and to be made, at the rate of seven per cent. per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract; and the cashier of said two corporations and treasurer of the Boston and Lowell Railroad Company is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due

to the Boston and Lowell Railroad Company out of the joint receipts of said two corporations."

I call your attention to that vote, passed July 23, 1872. State whether or not you were present when said vote was passed.

Ans. On refreshing my memory by the record, I find, by the record, that I was there with Mr. Crowninshield and Mr. Sigourney, and Mr. Stearns appears to have been there, in addition, in the afternoon.

Int. 24. State whether or not the plan of settlement and of compensation to be paid by the Nashua and Lowell Railroad Corporation to the Boston and Lowell Railroad Corporation for the use and benefit of the terminal facilities erected by them, as contained
150 in said vote, was what had been previously agreed upon and understood by the directors of each of said roads.

(Objected to, first, as leading; second, as assuming that some agreement had been previously made between said directors and as asking witness to testify to such previous agreement without reference to the fact that such previous agreement, if it existed, must have been in writing and not capable of proof by parol.)

Ans. I think it was the plan that had often been talked over and understood by the directors of both roads.

Int. 25. State whether or not the plan of settlement and compensation contained in said vote had been the subject of conference between the members of the several boards of each of said corporations; and, if yea, whether or not the members of said boards had arrived at an agreement and understanding, before passing said vote, in relation thereto.

Ans. I think that plan was understood by the directors of both roads, and it is in my memory that before that vote was passed it was talked over among the directors to put it in the form of votes, by the directors of each corporation, on the records.

Int. 26. State in what particular, if any, the plan of settlement and compensation contained in said votes differed from the talk which you say was had by the directors of each corporation before passing the same.

(Objected to because the question assumes that the vote or votes of July 23, 1872, contain any plan of settlement whatever, and because the witness is asked to make a comparison between the terms of said vote and what had occurred in talk had between the directors of both corporations prior to the date of such vote, and because, if this proof could be made by parol, the effect would be to give to said vote a date earlier than that which really belongs to it—that is, to give it effect retrospectively.)

Ans. I don't call to mind any differences.

Int. 27. After the passage of the vote of July 23, 1872, state whether or not monthly statements were presented to the directors of the Nashua and Lowell railroad and semi-annual payments were made in accordance with the said vote.

Ans. I think that the monthly statements were made to
151 both boards sitting together, and I do not seem to recollect about the settlements. I suppose the manager's papers, or the treasurer's, will show that.

Int. 28. When you say "to both boards sitting together" do you mean anything more than that they sat at the same table?

Ans. That is what I mean, that they sat at the same table. I think generally the Boston and Lowell at the north end of the table and the Nashua and Lowell at the south—that is, sitting together at the end and sides of the table—not at the exact end.

Int. 29. What is your recollection about the purchase of a majority of the stock of the Salem and Lowell railroad and Lowell and Lawrence railroad and the interest allowed by the Nashua and Lowell railroad upon the purchase-money for the same? Give all your recollection about it at this time.

(Objected to as assuming, without proof, that interest was allowed by the Nashua and Lowell Railroad Corporation upon the money paid for said stock.)

Ans. I have very little recollection about it. I understood that the Boston and Lowell bought it. Those roads went into the joint operation, and I understood the Nashua and Lowell in some way made up a proportion of the loss.

Int. 30. State whether or not there was any dissent on the part of any one of the directors of the Nashua and Lowell railroad, either to the building of the additional terminal facilities at Boston, the building of the depot at Winchester, or the purchase of the majority of the stock of the Lowell and Lawrence and the Salem and Lowell railroads or to the payment of seven per cent. interest upon thirty-one per cent. of the cost of said increased facilities and purchases, until long after said terminals were built and said purchases were made.

Ans. I can't call to mind any now.

Int. 31. By whom was the objection to the payment of interest first made in the board of directors of the Nashua and Lowell railroad, according to your best recollection?

Ans. I don't know as I can say, but I remember Mr. Brooks' objecting to it in a letter to me, and I think I mentioned it in the board.

152 Int. 32. At that time was Mr. Brooks a director?

Ans. He was not.

Int. 33. Did he afterwards come to be a director in the road?

Ans. Yes, sir.

Int. 34. After he became a director in the road which of the directors of the Nashua and Lowell most strenuously insisted upon rescinding or attempting to rescind the action of the board of July 23, 1872?

Ans. Mr. Brooks took an active part in it; I don't know as I will make any comparison between Mr. Brooks and his friends.

Int. 35. Up to the time of Mr. Brooks' coming into the board of the Nashua and Lowell railroad had that road been enjoying the

advantages of the terminal facilities erected and paid for by the Boston and Lowell railroad? And, if you answer in the negative, state in what respect they had not been enjoying them, if in any.

Ans. So far as I remember they had been enjoying them.

Int. 36. Whether or not the upper roads, so called—I mean the Northern, Vermont Central, Boston, Concord and Montreal, Concord and Claremont, and other roads having freight coming from the north to Boston—paid terminal charges for the privilege of using these Boston facilities.

Ans. I understood they did, but I suppose the accounts show that better.

Int. 37. To your knowledge was there ever any failure by the Boston and Lowell railroad to turn over these earnings (I mean the terminal charges paid by other roads) to be accounted for under the contract between the two roads?

Ans. I don't remember hearing any.

Int. 38. Have you any knowledge that either Mr. Brooks and his friends or any members of the board of directors of the Nashua and Lowell railroad either paid back or offered to pay back to the Boston and Lowell railroad any of these earnings (terminal charges) upon the ground that these terminals were owned by and were for the sole benefit of the Boston and Lowell railroad or upon any other grounds?

Ans. I don't remember any.

153 Cross-examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

Cross-int. 39. At the inception of the joint-traffic contract (1857) did not each of the two contracting corporations own respectively its railroad in a completed or finished condition, each provided with all that was necessary for the accommodation of the traffic at that time; if not, how otherwise?

Ans. I suppose both companies owned their railroads and equipments when they entered into the arrangement, and could do the business thereon.

Cross-int. 40. Were any changes or improvements required by the contract to be made, except the construction by the Nashua Corporation of a new freight depot at Lowell, at its own expense, and the completion by the Boston Corporation of its new passenger station at Boston, then under construction, its overhead crossing of the Fitchburg railroad track, also under way, and the alteration of the old passenger station at Boston into a freight depot, all at its own expense; if not, how otherwise?

(Objected to as calling for the construction of a written contract which is not in the hands of the witness and as incompetent.)

Ans. The contract will probably show that; I don't have in mind the particulars of the contract.

Cross-int. 41. Will you please look at the contract, especially at articles VI and VII thereof, and, after thereby refreshing your memory, answer more fully the preceding question?

(Objected to as asking the witness to assume the province of the court, as asking in cross-examination concerning new subject-matter not inquired of in the direct, and as attempting to put in evidence a contract not before legally proved by the testimony.)

Ans. Turning to articles VI and VII of the copy of the contract which Mr. Brooks has handed to me, I find the Boston and Lowell were within the year 1857 to complete the new passenger depot on Causeway street, with the tracks, bridges, and all necessary fixtures connected with said extension into Boston; to make such alterations in the old passenger depot as had been designed by the Boston and Lowell Company for converting it into a freight depot,
154 and to complete the crossing over the Fitchburg railroad and the connection with the Grand Trunk road at the same place; and I find that the Nashua and Lowell railroad were to erect a freight depot in Lowell, with its necessary approaches and furniture. I do not think I could call to mind all these things except by referring to the articles shown me.

(Counsel for defendants objects to the answer as reciting from what counsel for complainants claims to be a copy of some contract, and thereby attempts to put its provisions in evidence.)

Cross-int. 42. In view of the objection just noted made to your last answer by defendants' counsel, to wit, that your memory was refreshed by reference, not to the original contract, but to what purports to be a copy of the same, will you again look at the copy so examined by you and state if it is not a correct copy of said contract, and one printed and distributed by yourself and your associate directors as a part of the annual report of the directors of the Nashua and Lowell corporation for the year ending March 31, 1857?

(Objected to as incompetent as not correctly stating the ground of objection, as not correctly reciting the answer of the witness as to refreshing his recollection, and as asking the witness to state upon his oath what it is impossible to state without comparison of the paper handed him with the original contract, and as immaterial.)

Ans. The copy Mr. Brooks handed to me is contained in the appendix of what purports to be the twenty-second annual report in print of the directors of the Nashua and Lowell Railroad Corporation to the stockholders. I cannot tell by comparison as to the correctness of it. I see no reason to doubt the genuineness of the printed report, nor of the printed copy which seems to have been annexed thereto by the directors.

Cross-int. 43. Referring now to cross-int. 40, so far as you know, was any other outlay then contemplated by either corporation, or thought to be necessary or desirable, to render the two roads capable of meeting all the requirements of the then existing traffic? If so, state what other outlay was supposed necessary or desirable at that time.

(Objected to as incompetent.)

Ans. I do not call to mind any at present.

155 Cross-int. 44. Was not the division of the joint earnings, as agreed on originally (1857), predicated on the expectation on your part that the two roads were to be kept in their then relative condition of repair at the joint expense, and that, if so done, each corporation would get no more than its fair share of the income or proceeds of the joint traffic under the ratio of division fixed by the contract, thirty-one per cent. for one and sixty-nine per cent. for the other?

(Objected to as incompetent and immaterial, what his expectation was.)

Ans. If you mean by that, that if the roads had stood just still, keeping up the repairs, I suppose each one would have got his just share as estimated at the time—that is, if no increase of accommodations were made on either road.

Cross-int. 45. You did not, did you, as one of the directors of the Nashua and Lowell Corporation, at that time expect, under the working of the contract, that the Nashua Corporation would or could be called upon by the Boston Corporation to make any contribution of money for additional construction or improvement of any part of the Boston and Lowell road or the terminal facilities thereof, so long as the ratio for division of earnings fixed by the contract remained the same?

(Objected to because the expectation of the witness as a director or otherwise, if he had any that he now recollects, is incompetent and immaterial, and because it appears from the testimony that the increase of traffic and the taking in of other roads, through which such increase of facilities became necessary, did not exist at the time the contract was made.)

Ans. I don't recollect what my expectations were upon that subject.

Cross-int. 46. I find in the twenty-third annual report, in print, of the Nashua Corporation, purporting to be signed by yourself and the other directors, in stating the facts or reasons in your mind for entering into this joint contract, it is said:

"A careful investigation of the resources of each road" (meaning these two roads), "their past earnings, and their prospective improvements, if continued in separate operation, led to the establishment of the ratio of division at sixty-nine and thirty-one per cent."

156 Am I not right in thinking that when you used that expression or signed it you did not expect, so long as the ratio of division or earnings remained the same, that either party to the contract could or would be called upon to contribute to the cost of additional construction or improvements made wholly upon the road of the other?

(Same objections, and as immaterial.)

Ans. I can't say what my expectations were then. It would hardly seem to me now, if one road had remained stationary and the other had laid out large sums of money, and thereby increased their business and the profits thereof, the other road should receive their proportion of the profits of such increased business without bearing some proportion of the expense thereof.

Cross-int. 47. You do not mean, probably, by your answer to say that the business of either of these two roads has not increased equally, or nearly so, with that of the other, do you?

(Objected to as argumentative and incompetent.)

Ans. I should be inclined to think that the increase on the Boston and Lowell has been greater than on the Nashua and Lowell—the local business.

Cross-int. 48. Has not the local business of the Boston and Lowell road been subjected to loss by competition with a second road between Boston and Lowell, owned by the Boston and Maine Corporation?

(Objected to as before.)

Ans. I should suppose it had.

Cross-int. 49. Notwithstanding this fact, do you think that the local business of the Boston and Lowell Corporation, relatively to the local business of the Nashua and Lowell, has been increased? I mean the local business on the main track of these two roads.

(Same objections.)

Ans. I should be inclined to think so. I suppose that can be ascertained by referring to the work they have done, which I haven't examined into.

Cross-int. 50. Do you think the profit realized from the local business of the Boston and Lowell Corporation has increased in the same ratio with the volume of that business?

(Same objections.)

157 Ans. I don't think I have information enough with regard to the freight rates and the passenger rates to express an opinion on that subject.

Cross-int. 51. Is it not, generally speaking, true that where business is done by railroads in competition with other roads the profits are much less than when done without competition?

(Customs of other roads objected to.)

Ans. I think it is generally supposed so.

Cross-int. 52. You do not probably mean to be understood, do you, as suggesting that the Nashua Corporation has not contributed to the cost of the increased terminal facilities at Boston, independently of the vote of July 23, 1872, and of all sums paid under the same?

Ans. I don't mean to make a suggestion. I suppose whatever the

Nashua has contributed will be shown in the accounts of the roads.

Cross-int. 53. Did not the Nashua Corporation, in 1868 or thereabouts, join the Boston Corporation in making a purchase on joint account of the warehouses on Lowell street, Boston, for increase of freight accommodations at Boston, at a cost of $300,000 or thereabouts, and contribute thirty-one per cent. of such cost, and become the owner of thirty-one undivided one-hundredth parts thereof; if not, how otherwise?

Ans. I understood so.

Cross-int. 54. Did not the Nashua Corporation afterwards, during the financial year 1870–'1 or thereabouts, unite with the Boston Corporation in the purchase and ownership of the Mystic wharf property, and contribute thirty-one one-hundredth parts of the cost thereof; if not, how otherwise?

Ans. I understood so.

Cross-int. 55. Did not the share of contribution by the Nashua corporation to the cost of the Mystic wharf purchase and of the improvements thereon made down to April 1, 1878, amount to the sum of $182,355.26, or does it so appear from the report of the directors of said company for the year ending April 1, 1878; if not, how otherwise?

158 (Objected to as incompetent and calling for contents of a report which, if admissible, is the best evidence.)

Ans. I cannot say what it did amount to, but in the printed report for 1878, handed me by Mr. Brooks, it is put down among the resources of the road at $182.355.26.

Cross-int. 56. Whether or not, as you understand that report, it appears from it that the sum of $182,355.26 had been expended upon that property at that time; if not, how otherwise?

(Same objections.)

Ans. From this report and the word "resources," I should suppose that was the valuation they made at the time, and I should think it very likely that they kept an account of what they paid for or on account of that property and took that for the valuation, but I suppose the books of the Nashua and Lowell Corporation will show how that was done.

Cross-int. 57. Have you any doubt that the books of the Nashua and Lowell Corporation, as of April 1, 1878, do show the fact that $182,355.26 had been spent by that company for Mystic quay at that time?

(Same objections.)

Ans. I should expect that their books would thus show, and I have no information to the contrary.

Cross-int. 58. Do you believe or disbelieve the fact to be so?

(Same objections.)

Ans. I believe the fact to be so, if that item is made up in the manner suggested by Mr. Brooks.

Cross-int. 59. Did not the Nashua Corporation, at its own cost, in 1873 or thereabouts, erect at Lowell a large freight-house for the accommodation of the increased business at that point, and expend thereon its own funds to the amount of $100,000 or thereabouts; if not, how otherwise?

Ans. I understood so.

Cross-int. 60. When first, according to your memory, was any vote passed or other official and formal action taken by the directors of the Nashua and Lowell Corporation for the purpose of committing the Nashua Corporation to bear or share with the Boston and Lowell Railroad Corporation any part of its outlay in improving the
159 Boston passenger station belonging solely to the Boston and Lowell Corporation? In answering this question please avoid allusion to any talks or discussions upon this subject between members of the two boards which were not accompanied by some vote or other formal action at some meeting of the said directors.

Ans. I do not remember, and should have to refer to the records to determine. I do remember the vote of July 23, 1872.

Cross-int. 61. So far as your memory serves, was not the vote of July 23, 1872, referred to in your direct examination, the first instance of any such vote or formal action; if not, how otherwise?

(Objected to as incompetent; the records will show for themselves.)

Ans. I can't call to mind now any vote passed previous to that one on the subject.

(Same objection to the answer.)

Cross-int. 62. Was not the vote of July 23, 1872, passed at a joint meeting of the two boards?

Ans. I think it was passed at Young's Hotel, when both boards were present, but I think it was passed as the separate vote of the Nashua and Lowell railroad, as it was recorded.

(Last portion of answer objected to as not responsive.)

Cross-int. 63. Have you any distinct recollection of the circumstances attending the passage of this vote?

Ans. Refreshing my memory by the record, I think I have.

Cross-int. 64. What part of the record leads you to suppose that this vote was passed by the directors of the Nashua and Lowell Corporation acting separately or independently of the directors of the Boston and Lowell Corporation?

Ans. Because it is my memory that whenever there was a vote to be passed by one or the other of these boards when we were together the vote was so put as to be understood and voted by the directors of the two roads separately, and I can't call to mind an instance to the contrary.

Cross-int. 65. You do not, then, mean that the record of that meeting, as kept by the Nashua and Lowell directors' clerk, shows or tends

to show that this was not passed by a joint vote, but that you think it was not so passed, as you say it was not the custom to pass votes jointly or in that way; am I right?

160 (Objected to as incompetent, and because complainants cannot contradict the record of their own board of directors in a suit to which they are a party.)

Ans. The record seems to me to be a record of the separate vote of the Nashua and Lowell Corporation, and I see no reason to doubt this, and what is in my memory as to the custom of voting leads to the same conclusion. I think that that record shows that that vote was passed by the separate board. I think it purports to show that.

Cross-int. 66. Does your memory as to what took place at that meeting enable you to say that this vote was passed separately by the directors of the Nashua and Lowell Corporation?

Ans. My memory doesn't enable me to say the particular way that that vote was passed, except so far as I am aided by the record.

Cross-int. 67. I cannot myself understand how the record serves to enable you to infer that this vote was passed by the separate action of the Nashua and Lowell directors. Please specify the portion of the record which leads you to this conclusion.

Ans. Because I take it as a record of the doings of the Nashua and Lowell Railroad Company, purporting to be made by Stark, the clerk, and because I see that I was present at the meeting, and have no reason to doubt its correctness, and that leads me to the conclusion that the action therein recorded was properly stated, and it purports to be a meeting at which Messrs. Crowninshield, Stearns, Richardson, and Sigourney, directors of the Nashua and Lowell railroad, were present.

Cross-int. 68. Does it not appear from this record that there was held at the same time and place a meeting of the directors of the Boston and Lowell Corporation?

(Objected to as calling for the contents of records other than the records of the Nashua and Lowell Railroad Corporation.)

Ans. I don't understand it as showing so.

Cross-int. 69. Please look at these words which I find in this record just preceding the record made of the passage of this vote:

"Judge Abbott, of the Boston and Lowell board, presented the subject of the expenditures made and being made by the several companies for improvements, and it was voted"—

Then follows the vote in question.

161 Knowing the fact that Judge Abbott was then a director in the Boston and Lowell Corporation, and the further fact, as already testified by him in this case, that this vote was prepared or drawn up by him—I understand it was offered by him—he not being one of the directors of the Nashua and Lowell Railroad Corporation, I therefore infer that the vote so offered by him was offered for the action of the directors of the Boston and Lowell Corporation; cer-

tainly not for the separate action of the directors of the Nashua and Lowell Coporation.

Will you state why, if I am right in the above facts and inferences, this record does not contain evidence of a joint meeting of both boards of directors at this time? And, if I am wrong in the facts or inferences above drawn, please state wherein I am wrong.

(Objected to because the witness cannot be required to spend his time in correcting the errors and misapprehensions of such questions, and it is incompetent to ask it.)

Ans. I said I didn't understand the record as showing a session of the other board. Even if Judge Abbott drew up the resolutions and presented them that does not show to me that both boards were in session together when the vote as recorded was passed. It would rather show, if Judge Abbott drew up the form of the vote, that he presented it to the directors of the Nashua and Lowell railroad for their action.

Cross-int. 70. I find these words contained in the vote itself:

"And the cashier of said two corporations and the treasurer of the Boston & Lowell R. R. Co. is hereby directed to make up an interest account," etc., "and pay the amount found due to the Boston and Lowell R. R. Co. out of the joint receipts," etc.

Do you understand that the Nashua and Lowell directors, and they alone, had any right to instruct and direct the treasurer of the Boston and Lowell Railroad Corporation what to do in any respect; or did you, as one of the Nashua and Lowell directors, pass a vote giving such instructions to the treasurer of the Boston and Lowell Corporation?

Ans. I suppose, from the manner the funds and accounts were kept, this vote was a proper one to express the intent of the
162 Nashua and Lowell railroad, and do not suppose it was intended to operate upon funds upon which they could have no word of control.

I see no reason why the directors of the Nashua and Lowell railroad might not appoint the treasurer of the Boston and Lowell Railroad Company their agent to make up an interest account and authorize him to pay, so far as they were concerned, out of the joint receipts of said two corporations, the amount found due to the Boston and Lowell Railroad Corporation.

Cross-int. 71. You do not, then, think it improbable, do you, that the Nashua and Lowell directors, acting independently of the Boston and Lowell directors, did in fact pass a vote giving instructions to the treasurer of defendant corporation, but not appointing him their agent for any purpose?

Ans. I do not think it improbable that they passed that vote as there recorded, acting as a separate board.

Cross-int. 72. Just preceding the vote in this record it appears that a communication from General Butler relating to one of the branch tracks of the Boston and Lowell Corporation in Lowell was referred to Messrs. Daniel S. Richardson and Hocum Hosford with

full powers. Do you think this reference to you and Mr. Hosford was made by the Nashua and Lowell directors alone? Was Mr. Hosford a director of the Nashua and Lowell Company?

Ans. I think Mr. Hosford was not a director of the Nashua and Lowell Company, and I think most likely that matter was referred to us by the separate votes of both corporations; I don't remember.

Cross-int. 73. Why is it improbable that this reference was made by a joint vote of the two corporations?

Ans. Because I understand this record of the Nashua as showing a separate vote.

Cross-int. 74. Is this your only reason?

Ans. I think I'd further say that I don't remember of their voting by joint votes.

Cross-int. 75. According to your understanding of the law, had the Nashua and Lowell Corporation or its directors, under the charter of that company, under the laws of Massachusetts or of New Hampshire in 1872, any right to join the Boston and Lowell Corporation in purchasing or to contribute toward the expense
163 of purchasing the Salem and Lawrence or Lowell and Lawrence roads or either of them?

(Objected to as incompetent, as asking an opinion of law.)

Ans. I don't know as I can say that they had any special authority or right to do it; but if the purchase was valuable to their business I suppose it would be matter for the sovereign power to interfere with, or the Legislature, if they should find it an improper act to be done.

Cross-int. 76. Answer the same question with reference to the legal capacity of the Nashua Corporation to contribute funds towards the construction of the passenger station of the Boston and Lowell Corporation in Boston, or to the interest of such cost after construction.

(Same objections.)

Ans. As the Nashua and Lowell and Boston and Lowell railroads were opening together the two roads at their joint expense and for their joint benefit, I see no reason why the one road should not bear a fair proportion of the expenses required for improvements necessary on the other road to carry out in proper manner the purposes for which they were chartered and united by paying their share at least for the use of such improvements, or in some proper manner.

Cross-int. 77. You use the term "expenses required for improvements" in your last answer. When the improvements in question are those of new construction and not of repair or relative repair, as provided in the joint contract, do you think the expenses of such new construction upon one road ought to be borne in part by the other road, irrespectively of its effect upon the share of income fixed by the contract or without reference to this fact?

(Objected to as incompetent and immaterial.)

Ans. Yes, sir; I should apply the same rule to a case of construc-

tion, that in some way the road that lays out the money for construction for the joint business should in some proportion have some compensation for the use thereof for the joint business.

Cross-int. 78. Was not the terminal charge at Boston, referred to in your direct examination, made before the erection of the new station, and was not a similar charge made for freight handled at Nashua at the same time?

164 Ans. I don't know as I can now call up any recollection as to those matters, but I suppose the accounts will readily show.

Cross-int. 79. Was any change made in those charges by reason of the Boston improvements or passenger station?

Ans. I don't seem to remember that now, but I suppose the account will show.

Cross-int. 80. It appears from the reports that at the inception of this contract the capital stock of the Nashua Corporation was $600,000, and that the road was free from debt. In the forty-second annual report of the directors of the Nashua Company, signed by you and the other directors, it appears that the capital stock was $800,000, and its indebtedness in bonds and notes payable $450,000. From this, as I understand, it seems that $650,000 had been added to the investment of the Nashua and Lowell during that time. Is not this true?

(Objected to as incompetent and calling for a recital by witness of one of complainants' reports, and as giving the inference of the complainants' attorney in relation thereto.)

Ans. I know no reason to doubt the correctness of the balance-sheets of April 1, 1877, as exhibited and put into the report. Comparing that with the balance-sheet of April 1, 1857, which you have shown me, you can see what the increase has been for yourself of capital, etc.

Cross-int. 81. Have you any objection to stating how you find the fact to be as inquired in the last question, assuming these printed reports to be correct?

(Objected to as incompetent, offering verbal testimony of the contents of a printed report.)

Ans. I have no objection to stating how they appear in these reports.

In 1857 the capital stock appears	$600,000 00
Unclaimed dividends	2,496 50
Individual accounts	34 22
Wilton road	7,649 09
Dividend No. 37 declared	21,000 00
Contingent fund	67,246 22
Suspense account	20,000 00
Balance of surplus material	18,153 13
Aggregating	$736,579 16

165 In balance-sheet of April 1, 1877, the capital stock appears	$800,000 00
Gold bonds	200,000 00
Notes payable	250,000 00
Cashier, joint roads on account	12,715 34
Unclaimed dividends	1,039 00
Dividend No. 74	16,000 00
Contingent fund	72,954 98
Amounting to	$1,352,709 32

If I have made no mistake in reading off the figures.

Direct examination resumed:

Int. 82. State whether or not the vote of July 23, 1872, was passed in good faith by the directors of the Nashua and Lowell Railroad Corporation, and whether there was any fraud or wrong-doing in relation to said vote or the matter covered by it, so far as you know.

Ans. So far as I know, that vote was passed by them in good faith, and there was no fraud or wrong-doing in relation to said vote or the matters covered thereby, so far as I know.

DANIEL S. RICHARDSON.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of George Stark.

Direct examination by A. A. STROUT, Esq., of counsel for defendants:

BOSTON, *Aug.* 27, 1885.

Int. 1. Please state your name and residence, and if you have heretofore testified in this case on behalf of complainants.

Ans. George Stark, of Nashua, N. H.; I have testified in this case for complainants.

Int. 2. Were you connected with the Boston and Lowell Railroad Corporation and the Nashua and Lowell Railroad Corporation from 1857 to 1875; and, if so, in what capacities?

166 Ans. I was connected with both of those corporations during that period of time as managing agent for the two corporations, and also as clerk of the directors of the Nashua and Lowell Corporation, and I was also a director in the Boston and Lowell Corporation for a short period at the latter part of that time; I think for the years 1874 and 1875.

Int. 3. Before 1857 had you been connected with the Nashua and Lowell Corporation; and, if so, in what capacity?

Ans. From 1853 to 1857 I was the superintendent of the Nashua and Lowell railroad.

Int. 4. By whom were you chosen or appointed joint manager on and after 1857?

Ans. By the directors of each road.

Int 5. Whether or not the fact that you were such joint manager appeared in the annual reports laid before the stockholders of each corporation at their annual meeting, directly or indirectly.

Ans. I have not looked up those reports, but, according to my best recollection, the appointment did appear in each of them.

(Counsel for complainants admits that it was known to the stockholders of each road and accepted by them that the witness was the joint agent for the management of both roads under the twenty years' joint contract, or until March 31, 1875.)

Int. 6. Who was the president of both corporations while you held the office of joint manager?

Ans. Francis B. Crowninshield.

Int. 7. Where did you have your office?

Ans. In Boston; and I had also an office in Nashua.

Int. 8. At the time you took charge of the management of both roads state the condition of the roads as to amount of passenger and freight traffic, and what facilities there were at the Boston end of the road for its accommodation.

Ans. The traffic in 1857 was very much less than it subsequently became. The accommodations at Boston consisted of a very small passenger station at foot of Lowell street, soon after superseded by a new passenger station on Causeway street (not the present one), and the freight facilities in Boston were confined to the grounds adjoining Leverett street. The property known as the corpo-
167 ration stores had not then been acquired by the railroad; the Cambridge property was largely flats, unfilled, and the Mystic River property had not been acquired.

Int. 9. When, if ever, was the Mystic River property acquired and railroad facilities there built, and when was the present passenger station in Boston, occupied by the Boston and Lowell railroad, built?

Ans. The Mystic River property was acquired in 1871. The present passenger station in Boston was completed in 1873.

Int. 10. State whether or not the freight and passenger traffic over the two roads increased from 1860 to 1873; and, if so, state in what proportions such increase was, how many passengers were carried, and how much freight was carried, and what the percentage of increase or decrease was between the two periods.

Ans. It did increase very much. The increase on passengers was from 705,000 to 2,086,000, an increase of 196 per cent. The freight increased from 449,000 tons to 605,000 tons, an increase of 35 per cent. The gross receipts increased from $544,000 to $1,420,000, an increase of 161 per cent.

Int. 11. What did you find the fact to be as to the sufficiency of accommodation at the Boston end for this increase of business? And state the different steps that were taken to remedy the insufficiency of facilities, if any such existed.

Ans. The accommodations were quite insufficient, both for freight and passengers, and the deficiency increased as the business increased. The passenger station on Causeway street, completed in

1857, I think; was the first step taken to meet the deficiency. Subsequently the railroad purchased property on Lowell street, known as the corporation storehouses and wharf, and altered and converted the same into freight purposes and into a grain elevator. That property last mentioned was bought jointly by the Boston and Lowell and Nashua and Lowell companies, and held jointly in the proportions of 69 per cent. by the Boston and Lowell and 31 per cent. by the Nashua and Lowell. The property of the Boston and Lowell road in East Cambridge was much of it filled up and converted to freight use. The companies also jointly purchased what is known as the Mystic River property, and held it for freight
168 purposes in the same proportions of ownership as they held the corporation store property. In 1872 it became apparent that the passenger business required greater accommodations in Boston, and the present passenger station of the Boston and Lowell road in Boston was constructed to meet the want. A railroad was constructed to connect the Mystic property with the Boston and Lowell road in order to make it available as a freight terminus.

Int. 12. State whether or not, as joint manager or agent of both roads, you brought to the knowledge of both corporations the deficiencies which you say existed for the accommodation of freight and passengers prior to 1873, and whether the same were known to them.

Ans. I did in each instance bring these wants to the knowledge of each board of directors.

Int. 13. State what "upper roads" contributed to this freight and passenger business after the commencement of the joint management of the two roads.

Ans. The Concord railroad, the Northern railroad, the Boston, Concord and Montreal railroad in New Hampshire, the Vermont Central railroad in Vermont, the Passumpsic railroad in Vermont, and the Ogdensburg railroad in New York, with their several tributaries and connections, brought most of the upper railroads business.

Int. 14. State whether or not these railroads had outlets open to them for their freight and passenger business other than the Nashua and Lowell and Boston and Lowell at the time these facilities were supplied as stated by you, and if you answer yes state what those outlets were.

Ans. They did. The roads named lying north of Manchester could reach Boston or Salem by way of Lawrence independently of this line of roads and could reach New York by way of the Worcester and Nashua road. The Vermont road and the Ogdensburg road could also reach Boston by way of the Fitchburg road and could reach New York by way of the Connecticut River lines.

Int. 15. State what danger, if any, the lack of terminal facilities in Boston for freight and passengers, as you have stated,
169 threatened as to the loss of the business of these upper roads, or a part of it, before the same was remedied.

Ans. It became manifest that we could not retain the upper business without largely increasing the facilities at Boston. The Manchester business in particular threatened to go to the Boston and

Maine road, as did also the other connecting business in New Hampshire, and the Vermont and Ogdensburg business threatened to go to the Fitchburg road.

Int. 16. Whether or not this business was valuable and necessary to the prosperity of the Boston and Lowell and Nashua and Lowell roads.

Ans. It was so considered.

Int. 17. State where the board of directors of the Nashua and Lowell road and the board of directors of the Boston and Lowell road had their office for meetings prior and subsequent to 1873.

Ans. During the greater part of that time the meetings of the directors were held at the office of the manager in Boston, at the railroad station.

Int. 18. Whether or not these facts, testified to by you, were called to the attention of the different boards prior to 1873 and talked over by them. State the facts generally about that.

Ans. It was my custom to report to the boards monthly all matters of interest, and more especially the wants of the business in the way of improvements. The directors always appointed committees to act with me in these matters, and nothing was undertaken until after full consideration and discussion and authority granted by the directors.

(Last part of answer objected to as containing matter not capable of proof by parol evidence.)

Int. 19. State whether, after the building of the present passenger depot, a charge of five cents a head for passengers was attempted to be established as against the upper roads, to be paid the Boston and Lowell road, and whether that was abandoned, and for what reason it was abandoned.

Ans. My recollection is that previous to the construction of the present passenger station in Boston, but while its construction was under consideration, the connecting roads were asked to con-
170 tribute an additional five cents per passenger on their business as an inducement to the Boston and Lowell railroad to make the outlay. The upper roads declined to make this allowance, but offered to continue their business with the Boston and Lowell road if the increased facilities were afforded, and offered to submit to a terminal freight charge of thirty cents per ton, about which they had previously been at variance with the Boston and Lowell road.

Int. 20. State whether or not the Nashua and Lowell road received their proportional part of the benefits arising from this continued business and payment of terminal charges as long as such continuance and payment existed.

Ans. They did, up to the time I left the roads, since which I have no knowledge.

Int. 21. State whether the Nashua and Lowell Railroad Corporation united with the Boston and Lowell in their efforts to obtain the proper legislation for taking land and building these additional terminal facilities.

Ans. They did so unite.

Int. 22. Whether or not, after the act of 1869 was so obtained, negotiations were had with the Eastern railroad for a joint depot, and whether the Nashua and Lowell Corporation participated therein.

Ans. My recollection is that such negotiations took place, and that a committee of ten directors of the Nashua and Lowell road was appointed to join in such negotiations.

(Latter part of answer objected to as not susceptible of parol proof.)

Int. 23. What was the result of these negotiations with the Eastern road?

Ans. The Eastern road did not join in with the Boston and Lowell road in getting additional facilities in Boston.

Int. 24. After those negotiations failed what did the Boston and Lowell and Nashua and Lowell roads do to obviate the difficulties which you say they were experiencing for the want of proper facilities?

(Objected to, so far as any acts done by the Nashua and Lowell are concerned, as not suitable for proof by parol.)

171 Ans. The directors of the two companies, the Boston and Lowell and the Nashua and Lowell, agreed together that the Boston and Lowell Company should construct the present passenger station, and that the Nashua and Lowell Company should pay thirty-one per cent. of the annual interest upon the outlay, computing the interest at seven per cent. per annum.

Int. 25. Was seven per cent. interest paid for the money borrowed for the above purposes?

Ans. I couldn't say; it didn't come within my department.

Int. 26. Where were the annual meetings of the stockholders of the Nashua and Lowell railroad held during the time of the joint management of the roads?

Ans. They were held at Nashua.

Int. 27. Whether or not, to your knowledge, these wants of suitable railroad facilities were understood and talked over by the principal stockholders of the Nashua and Lowell railroad during these times.

Ans. They were.

Int. 28. Did you ever hear any dissent from any one of them in relation to the course pursued by these two corporations in relation to the furnishing of these facilities until long after the completion of the same?

(Objected to because it does not appear by competent evidence that the plaintiff corporation had anything to do with the construction of the new passenger depot, or, if it had, that the stockholders were informed thereof at or before the construction of such depot.)

Ans. I never heard of any dissent from a stockholder in the Nashua and Lowell road, unless it may have been that there was some in-

formal talk and comment upon the magnitude of the structure, and I have heard people say that they thought the outlay too large. Possibly some Nashua and Lowell stockholder may have said it, to my knowledge, but I do not now recollect any such instance.

Int. 29. Was any action taken in relation to it by any stockholder until long after the buildings were completed and used by the corporations?

Ans. There was not.

Int. 30. State whether or not the outlay was, in your judg-
172 ment, formed at the time the outlay was made, as a railroad man and manager of the roads, necessary for the best interest of the two roads, and whether it was made in good faith by all parties concerned.

(Objected to because not a question of fact, but calling for the opinion of the witness in a matter not in issue.)

Ans. I did think it was necessary to make the outlay which was made, and I know it was made in good faith.

Int. 31. State whether or not you submitted to the directors of the Nashua and Lowell railroad plans of a structure to be erected for a passenger depot before the same was built.

Ans. I did submit such plans to them.

Int. 32. Whether or not you also submitted estimates of the probable cost of the structure to the same body.

Ans. I did.

Int. 33. Whether the same were considered by them.

Ans. They were.

Int. 34. I call your attention to a paper marked "Defendants' Exhibit 1, J. G. S., ex'r." State whether the same is a copy of votes passed by directors of the Nashua and Lowell Corporation, as it purports to be, and whether a committee was appointed as therein stated.

Ans. It is copied from the records of the Nashua and Lowell directors, and a committee was appointed as therein stated.

(Defendants' Exhibit 1 is put in evidence by defendants.

Counsel for defendants calls upon F. A. Brooks, Esq., counsel for the complainants, to produce the records of the Nashua and Lowell Railroad Corporation, now in his possession, to be used as evidence in this hearing, as per notice served upon him in the presence of the examiner at a former session, and makes said notice a part of this record as Defendants' Exhibit 2.

Counsel for complainants, in reply to the above request, says he is in possession of only a portion of the records specified in the notice previously given to him and referred to by defendants' counsel, and, if his attention is called to any particular part of the record in his possession as bearing upon any question involved in this suit, or to which the testimony of the witness under examination is required,

he will produce the same out of courtesy to defendants' counsel,
173 without conceding any right to him to call for such record, much less to call for all the records of the plaintiff corporation for

a period of thirty-two years, as set forth in the notice referred to, for the examination of counsel or of the witness, but not waiving any objection to the competency of such records as evidence in this case.

Counsel for defendants calls for the records of the following meetings of the directors of the Nashua and Lowell Railroad Corporation held on the following dates:

Sept. 22, 1853.	May 24, 1870.
Jan. 25, 1859.	July 26, 1870.
April 26, 1859.	Oct. 25, 1870.
Oct. 25, 1859.	Dec. 27, 1870.
Oct 23, 1860.	Jan. 24, 1871.
Dec. 24, 1860.	Feb. 6, 1871.
Nov. 26, 1861.	Feb. 20, 1871.
March 25, 1862.	Sept. 26, 1871.
March 24, 1863.	Nov. 28, 1871.
Aug. 25, 1863.	Dec. 26, 1871.
Aug. 23, 1864.	Jan. 23, 1872.
Dec. 27, 1864.	May 28, 1872.
Feb. 27, 1865.	July 23, 1872.
April 24, 1866.	Oct. 22, 1872.
Dec. 26, 1866.	Nov. 26, 1872.
Aug. 27, 1867.	Sept. 16, 1873.
Sept. 27, 1867.	Aug. 25, 1874.
Nov. 26, 1867.	Sept. 29, 1874.
Sept. 27, 1868.	Oct. 27, 1874.
Sept. 28, 1869.	Nov. 24, 1874.
Nov. 23, 1869.	March 23, 1875.
Nov. 27, 1869.	April 27, 1875.
Dec. 28, 1869.	June 7, 1875.
Jan. 25, 1870.	July 27, 1875.

In reply to the call of defendants' counsel to produce records of meetings named complainants' counsel says that it is obvious to his mind that the records of directors of complainant corporation extending back over a period of thirty-two years cannot be material or competent as evidence in regard to the claim made in this
174 suit, covering a period of about twelve years past; but to save defendants' counsel any inconvenience in obtaining the records inquired for, and in making such use of them as he may be lawfully entitled to in this case, if any, complainants' counsel now hands to defendants' counsel the original records called for prior to Aug. 27, 1867, excepting that of Sept. 22, 1853, the remaining records called for not being in the possessing of complainants' counsel.)

Int. 35. Please examine the book now shown you, marked for indentification "X, Aug. 27, 1885, J. G. S., ex'r," and say what the book is.

Ans. With the exception of a title record, which I know nothing about, the book is the records of the meetings of the directors of the Nashua and Lowell Railroad Corporation from July 18, 1856, to May 28, 1867, inclusive.

Int. 36. In what capacity were you acting during the time that this record purports to be kept?

Ans. I was acting as clerk of the board of directors of the Nashua and Lowell Railroad Corporation.

Int. 37. Whether or not the signatures to the records contained in this book, purporting to be the signatures of Geo. Stark, clerk, were written by you.

Ans. They were.

Int. 38. Will you please compare the paper handed you, marked "Defendants' Exhibit 3, J. G. S., ex'r," with the record contained in said book in your hands and state whether the same is a true and accurate copy thereof?

(Objected to because it does not appear that the record referred to has any reference to or materiality whatever in the issues involved in this case, and because the witness is not now and for ten years has not been clerk of the directors of the Nashua and Lowell railroad, and is not authorized by law to furnish copies of said record.)

Ans. I have so compared it; it is a true and accurate copy.

(Counsel for defendants offers said Defendants' Exhibit 3 in evidence.

Counsel for complainants objects to the same as incompetent.)

Int. 39. Will you please compare the paper handed you, marked "Defendants' Exhibit 4, J. G. S., ex'r," with the record con-
175 tained in said book in your hands and state whether the same is a true and accurate copy thereof?

(Counsel for defendants offers in evidence the record on pages 85 and 86 of the book marked "X" for identification.

Counsel for complainants declines to have the book go into the custody of the examiner to be retained by him, and the examiner does not mark the same as an exhibit.)

Ans. I have examined it, and find it a true and accurate copy.

Int. 40. Please make a similar examination with regard to papers marked "Defendants' Exhibit 5, J. G. S., ex'r," "Defendants' Exhibit 6, J. G. S., ex'r," "Defendants' Exhibit 7, J. G. S., ex'r," "Defendants' Exhibit 8, J. G. S., ex'r," "Defendants' Exhibit 9, J. G. S., ex'r," "Defendants' Exhibit 10, J. G. S., ex'r," "Defendants' Exhibit 11, J. G. S., ex'r," "Defendants' Exhibit 12, J. G. S., ex'r," "Defendants' Exhibit 13, J. G. S., ex'r," "Defendants' Exhibit 14, J. G. S., ex'r."

Ans. I have carefully compared said papers by inspection with the original records contained in said book marked "X" for identification, and said papers are true and accurate copies of said original records.

(Defendants' Exhibits 5 to 14, inclusive, named in Int. 40, are put in evidence by counsel for defendants.

Complainants' counsel objects both to the competency and the materiality of the papers called exhibits above offered in evidence.)

(Adjourned.)

AUG. 28, 1885.

(Counsel for complainants says that he was yesterday called upon to produce records of directors of complainant corporation as far back as 1853, and was not then aware that he had such records in his possession prior to 1856; that since the adjournment he has made examination and found the directors' records from the organization of the company, from 1836 to 1856; therefore he now produces the records, as requested by defendants' counsel yesterday, and hands them to defendants' counsel for inspection by him or by the witness under examination, but for no other purpose. He is unwilling that said records should be made an exhibit in this case or to part with the custody of said records, and will reclaim the same after they have been examined by defendants' counsel and by the witness.)

176 Int. 41. Will you please examine the records of the directors of the Nashua and Lowell Railroad Corporation produced by counsel for your inspection and compare therewith on page 77 of said records Defendants' Exhibit 15, now handed you, and state whether it is a true and accurate copy thereof?

Ans. It is correct.

(Defendants' Exhibit 15 is put in evidence by counsel for defendants.

Complainants' counsel objects to said exhibit both for want of materiality and competency.)

Int. 42. State whether or not all the foregoing exhibits, 3 to 15, inclusive, are copies from the book of record of the doings of the board of directors of Nashua and Lowell Railroad Corporation kept by you and are, so far they purport to be, an exact transcript of such record for the several meetings the doings of which are therein recorded.

(Objected to as above.)

Ans. They are.

Int. 43. State whether or not at this hearing in your presence said book of records was produced by the counsel of the Nashua and Lowell railroad present at the caption of this deposition.

Ans. It was.

Int. 44. State whether or not, before resorting to secondary evidence of the contents of such book of records, in your presence and in presence of the examiner, counsel for the defendants claimed to put said original records in the case, and whether the counsel for complainants refused to allow said book of records to be used for that purpose or to be retained by the examiner as evidence in this case, and only permitted the counsel for defendants and yourself to use said book for the purpose of examining the same.

Ans. As I understand the matter, the facts are as stated in the interrogatory.

Int. 45. State whether or not the writing and records contained in said book were made at or about the time of the holding of the

meetings the doings of which are therein recorded; and, if not, what part has been added since.

Ans. All of the records of meetings were written in the book at or about the times of the respective meetings recorded therein,
177 but I notice upon the fly-leaf at the commencement of the book some writing that was not in it when the book was finished—when it left my custody.

Int. 46. Please examine the paper marked for identification "X X, Aug. 28, 1885, J. G. S., ex'r," and state whether the same is an accurate copy of the writing upon the fly-leaf of said record, and which you say has been added since said record was completed.

Ans. That is an accurate copy.

Int. 47. State whether or not said writing was in said book of records when the same passed from your hands completed, as you stated.

(Objected to as assuming the witness has stated that said writing in now in said book of records as distinct from a fly-leaf at the commencement of or preceding said book of records.)

Ans. It was not.

Int. 48. In what book, if any, did you find the writing X X, which you have just identified as a true copy?

Ans. In the book containing the records of the directors of the Nashua and Lowell Railroad Corporation from July 18, 1856, to May 28, 1867, inclusive.

Int. 49. Who wrote it there, if you know?

Ans. It appears to be the writing of Francis A. Brooks, Esq.

Int. 50. Do you know it to be in his handwriting?

Ans. I know that it resembles his handwriting, and that he admitted to me that it was his handwriting.

Int. 51. Please examine carefully the paper marked "Defendants' Exhibit 16, J. G. S., ex'r," now handed you, purporting to be a copy of the record of the doings of the Nashua and Lowell Railroad Corporation, of date Sept. 28, 1869, signed by you as clerk, and state whether you have any doubt as to its being a true copy of the original record, and what your recollection is as to the transactions therein stated.

(Objected to as immaterial and incompetent.)

Ans. I presume it to be a true copy. I have definite recollection of the fact stated in the record, that Mr. Sigourney was appointed a committee on part of the Nashua and Lowell railroad directors to act in conjunction with a committee appointed by the Boston
178 and Lowell railroad directors with regard to improvement of terminal facilities in Boston. I recollect also that I submitted, as manager, plans for such improvement.

Int. 52. State whether or not, before submitting such plans, you went abroad to get the best information in relation to a passenger depot; and, if so, in whose behalf did you go, and by whom were your expenses borne in so going.

Ans. In the summer of 1869 the directors of the Boston and

Lowell and of the Nashua and Lowell railroads suggested to me that before commencing or completing the plans of the passenger station at Boston I had better take a little vacation and visit some of the principal railway stations in Europe. I did make such visit at that time and examined stations then built and building in England and France, and on my return the expenses of the trip were in considerable part paid by those railroad companies.

Int. 53. Please examine paper marked "Defendants' Exhibit 17, J. G. S., ex'r," now handed you, purporting to be a copy of the record of the doings of the directors of the Nashua and Lowell railroad on Nov. 23, 1869, and containing a letter purporting to have been written by you, and state whether you have any doubt that it is substantially a true copy and transcript of the original record of said meeting, whether you wrote the letter therein set out, and what your recollection of the transactions therein set out are.

(Same objection as before.)

Ans. I have examined the paper, and have no doubt it is a true copy of the records. I recollect writing such a letter and recollect that the circumstances were as detailed therein.

Int. 54. Please make a similar examination and statement of fact relating to paper marked "Defendants' Exhibit 18, J. G. S., ex'r."

(Same objections.)

Ans. I have examined the paper, and I have no doubt that it is a correct copy of the record. I have no distinct recollection of the transactions mentioned in this paper.

Int. 55. Please make similar examination and statement of fact touching paper marked "Defendants' Exhibit 19, J. G. S., ex'r."

179 (Same objections.)

Ans. I have made the examination, and I have no doubt the paper is a correct copy of the record. I have a recollection of proceeding with the Eastern railroad in the matter of negotiations for taking land for terminal facilities, etc., as set forth in the record.

Int. 56. Make similar examination and statement of fact touching paper marked "Defendants' Exhibit 20, J. G. S., ex'r."

(Same objections.)

Ans. I have made an examination of this paper, and have no doubt it is a correct copy of the record, and I have a recollection of the principal facts therein recorded.

Int. 57. Make similar examination and statement of fact touching paper marked "Defendants' Exhibit 21, J. G. S., ex'r."

(Same objections.)

Ans. I make same answer as to last.

Int. 58. Make similar examination and statement of fact touching paper marked "Defendants' Exhibit 22, J. G. S., ex'r."

(Same objections.)

Ans. I have examined this paper and make same answer as made to the previous question.

Int. 59. Make similar examination and statement of fact touching paper marked "Defendants' Exhibit 23, J. G. S., ex'r."

(Same objections.)

Ans. I have examined this paper and make the same answer as made to the last previous questions.

(Exhibits 16 to 23, inclusive, are put in evidence by counsel for defendants, subject to complainants' objections.)

Int. 60. State whether or not any difficulty arose with the two corporations in having a smaller station than that which was actually built and now standing; if so, state what it was.

Ans. Difficulties did arise in providing for the passenger business in the station-house which the present one superseded on account of its insufficient size, although it was once extended and enlarged after its first construction.

The new station now standing was constructed larger than the company desired at that time to make it, from the fact that, in taking new land for the purpose, they were obliged or considered it
180 expedient to take the entire block between Andover and Nashua streets, and, having taken of necessity so much land and also expecting that the Eastern railroad might join in the use of the new structure, the entire land so taken was utilized by building upon it.

Int. 61. Whether or not it has since proved that such building was wise and necessary, considering the extensions of the Nashua and Lowell and Boston and Lowell railroads.

(Objected to as calling for the opinion of the witness in a matter not involved in this case.)

Ans. I believe that it has so proved.

Int. 62. Calling your attention to the vote passed by the directors of the Nashua and Lowell railroad, July 23, 1872, relating to the improvements at Boston and Winchester, as stated in said vote, please state whether the subject-matter of that vote had been considered and thoroughly canvassed by the directors of the Nashua and Lowell railroad before that vote was passed.

(Objected to because it calls for proof of proceedings of the directors, which ought to appear by written evidence, if at all.)

Ans. The subject had been informally discussed and considered many times previous to that meeting, but formal action was finally taken on that date.

Int. 63. State whether any other mode of sharing in the expense of these improvements had been discussed by the directors of the Nashua and Lowell railroad before the passing of that vote of July 23, 1872.

(Objected to as incompetent.)

Ans. According to my recollection, other methods of adjustment were considered and discussed, and among them the question of joint ownership upon the basis of 69 and 31 per cent., but the Nashua and Lowell directors finally preferred the method which they agreed to in this vote.

Int. 64. State whether, after the passage of the vote, a monthly statement was rendered to the directors of the Nashua and Lowell Railroad Corporation, including the interest so agreed to be paid, and whether semi-annual settlements were made between the two roads, including the interest, as provided by said vote. Give
181 your best recollection in relation thereto so long as you were connected with the roads as joint manager.

Ans. My recollection is that such accounts were made up and presented to the directors and settled semi-annually between the two corporations until the close of my connection with the road, but my memory does not serve me as to the exact date when the account was commenced.

Int. 65. I hand you for examination and identification the annual reports of the directors to the stockholders of the Nashua and Lowell Railroad Corporation for the years 1872 to 1877, inclusive. Please state whether said reports are produced by you at my request, and what they are, and what use was made of them.

(Objected to because it does not appear that said documents, if reports, are in any way material to this cause.)

Ans. These are copies of reports of the directors of the Nashua and Lowell Railroad Corporation to the stockholders which were in my private files at my house and brought here at the request of defendants' counsel. They were submitted at the annual meetings of the stockholders, and the records of such meetings will show what action was taken upon them.

Int. 66. According to your recollection, were these reports rejected by the stockholders or adopted at such meetings? Give your best remembrance.

(Objected to as incompetent.)

Ans. It was customary for the stockholders to vote that the annual report be accepted and placed on file. I do not recollect any instance where this was omitted to be done.

Int. 67. Please state whether before such vote was taken copies of said reports were given to stockholders present at the several meetings, or were they provided so that any stockholder could get them who chose to do so?

(Objected to.)

Ans. Copies were distributed among stockholders at the meeting, and the report was also read to the meeting before any action was taken upon it.

Int. 68. Calling your attention to the said several reports,
182 state whether or not the amount of interest paid pursuant to the vote of July 23, 1872, appears as rent or in the interest account.

(Objected to for substance, and also because the question assumes facts not yet shown to exist.)

Ans. According to my recollection, the interest paid on cost of depot in Boston was included in rent account of the Nashua and Lowell railroad. I mean all the interest which was paid under the vote of July 23, 1872.

Int. 69. Whether or not, in the report of 1874, you find on pages 13, 14, and 15 a full account of the improvements mentioned in the vote of July 23, 1872.

(Objected to.)

Ans. I find in said report, on the pages named, a detailed statement of such improvements at that date.

(Reports above referred to are marked for identification: "Report (1872), J. G. S., ex'r;" "Report (1873), J. G. S., ex'r;" "Report (1874), J. G. S., ex'r;" "Report (1875), J. G. S., ex'r," and "Report (1877), J. G. S., ex'r.)

Int. 70. State whether or not the arrangement as to the payment of rental by the Nashua and Lowell Railroad Company on these improvements, equal to seven per cent. on thirty-one per cent. thereof, was in any way concealed, or was it a matter of notoriety among the stockholders, so far as you know.

(Objected to because the question incorrectly assumes that some arrangement had existed by which the Nashua and Lowell — Company was to pay rental on Boston improvements of the defendant corporation, and on such fact thus far appears, and of course if it did not exist as a fact it would be incapable of concealment, and because it calls for the opinion of the witness rather than the statement of any actual occurrence.)

Ans. There was no concealment, and I have reason to believe that the stockholders generally understood it.

Int. 71. Whether or not from the passage of such vote to the time that you left the corporation both corporations in good faith acted under and lived up to the provisions contained in the vote of July 23, 1872, and whether they enjoyed the advantages and benefits arising from the improvements named in said vote.

183 (Objected to for substance and as asking for the opinion of the witness.)

Ans. They did so live up to the arrangement as long as I continued with the companies, and did mutually receive whatever benefits came from the outlay.

Int. 72. I wish to call your attention to the station mentioned in said vote of July 23, 1872, as improvements in Winchester for a new station. Will you please state whether said improvements were for the joint benefit of the two roads, and what your recollection is about it?

(Objected to.)

Ans. My recollection is that improvements were necessary at Winchester, not only to accommodate local business, but to accommodate business at Winchester that came from the upper roads, and that a very considerable part of the outlay was for land to accommodate upper railroad freight. Under the working of the joint contract between the two roads each received its stated proportion of all receipts, whether through or local, and in this view the improvements were for mutual benefit.

Int. 73. Whether or not the erection of these improvements was made on good faith.

Ans. It was.

Int. 74. Whether or not the Nashua and Lowell Corporation had the use of them up to the end of its contract in common with the Boston and Lowell.

Ans. It did.

Int. 75. I call your attention to the matter of purchase, by the Boston and Lowell Railroad Corporation, of the majority of the stock of the Salem and Lowell railroad and Lowell and Lawrence railroad, and the interest allowed by the Nashua and Lowell railroad upon the purchase-money of the same. I wish you to state whether such purchase was necessary for the interest of both roads and the facts connected with the purchase and the payment of interest thereon as stated.

(Objected to.)

Ans. My recollection is that I made an extended written report upon the expediency of making those purchases; that the
184 said report was submitted to the boards of directors of the Boston and Lowell and Nashua and Lowell roads, and that its consideration by them led to the purchase of the stock and to the arrangement by which the Nashua and Lowell directors agreed that their road should share the burden of carrying it as subsequently arranged. I think I recommended the purchase.

(Latter part of answer objected to as undertaking to testify to agreements made by plaintiffs' directors, although no such agreements, so far as appears, are matter of record or of written evidence.)

Int. 76. Whether or not you ever heard any objection of any director or of any stockholder of the Nashua and Lowell railroad to the payment of the seven per cent. interest mentioned in the vote of July 23, 1872, for many years after said vote was passed.

Ans. I did not hear such objection until about 1877.

Cross-examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

Cross int. 77. You were, I believe, the clerk of directors of the Nashua and Lowell railroad several years prior to the joint-traffic contract of 1857–'58, and continued in the same office after the execution of the joint-traffic contract; is not that so?

Ans. I was such clerk from June, 1853, until April, 1875.

Cross-int. 78. After the execution of this contract did not the directors of both corporations hold monthly meetings together, and at those monthly meetings receive reports or communications from the joint agent or manager, you being such joint agent, during all the time that you were such joint agent?

(Objected to as contradicting the records of the complainant corporation and as new matter not hereinbefore inquired of.)

Ans. The directors of each corporation usually met each month, not always; they usually met at the same time and place to hear the reports and to act upon matters presented by the joint agent, who was by the contract subject to the concurrent control of these two boards.

Cross-int. 79. Were not these monthly meetings the only regular meetings held by either of the two boards of directors?

(Same objections.)

185 Ans. My recollection is that there were other separate meetings.

Cross-int. 80. I have no doubt there were. My inquiry is whether, so far as you know, the directors of either of the two corporations had any stated or regular times of meeting except the times when they met together at the same place monthly for the transaction of business in connection with the general manager?

Ans. I think there were no stated times of meetings of the directors of either company, except as it became the custom, which was generally observed, to meet with the manager each month to act upon his statements and reports.

Cross-int. 81. Was this practice of monthly meetings of both boards together continued so long as you remained manager, and was not the time of meeting some day in the fourth week of each month, and was not such day Tuesday; and, if not, how otherwise?

(Same objections.)

Ans. This custom was observed as long as I remained manager. The meetings were usually held in the latter part of the month, to enable the accounts of the previous month to be completed and presented, and I think the day was usually Tuesday.

Cross-int. 82. In a report of testimony given by you before the Massachusetts Legislature in 1863 I find the following language attributed to you when referring to these two railroads: "The road from Boston to Nashua is now substantially one road, and has been since 1857, the two corporations having been united at this time for twenty years, and they are managed as one road, by one agent, and substantially by one board of directors—they meet in common." Did you give such testimony and believe it to be correct?

(Same objections.)

Ans. I testified before the legislative committee at that time. Whether the testimony was correctly reported I could not now say;

but, in any event, it was a statement for popular use, and not in any sense a legal statement of the management, and is not legally correct.

I desire on my own account to make a correction that, according to my recollection, what is called testimony in the pamphlet handed me was not testimony, but a statement made to the committee.

Cross-int. 83. Whether or not the language imputed to you
186 and quoted in the preceding interrogatory was or was not actually used by you on the occasion of your appearance before the committee of the Massachusetts Legislature on railways and canals, in 1863, and purporting to be a phonographic report of the proceedings by J. M. W. Yerrinton, a well-known short-hand reporter of this city.

(Objected to for same reasons as before, and, further, the witness is asked to refresh his recollection from a paper not in his own handwriting or made by him at the time, outside of which he probably has no recollection.)

Ans. I cannot recollect.

Cross-int. 84. Have you any reason to doubt that you were correctly reported on that occasion?

(Same objections.)

Ans. No, I have no special reason to doubt it.

Cross-int. 85. This statement comes under the heading, "Testimony of George Stark, Esquire." If that description of what you said is incorrect please state wherein you think it so incorrect. Did you not appear on that occasion as a witness called by one of the parties to furnish evidence for or against a certain measure pending before the Legislature; if not, how otherwise?

(Same objections.)

Ans. My recollection is that I appeared rather in the capacity of an advocate than as a witness. I think the statement of what I said may be correct, because the management of the Boston and Lowell and Nashua and Lowell railroads, so far as it dealt with questions of public transportation, would naturally be presented to the Legislature as one interest.

Cross-int. 86. Do I understand you correctly as saying that you think you appeared on the occasion referred to not as a witness, but as an advocate, and that as an advocate the statement made by you was for popular use, and not in any sense a legal statement of the management, and is not legally correct?

Ans. I believe I have so said.

Cross-int. 87. Were you at the time aware that you were making a statement which was not legally correct?

(Same objections and as immaterial.)

Ans. I was.

187 Cross-int. 88. Was the statement made by you on that occasion that the two corporations (meaning plaintiff and de-

fendant corporations in this case) "are managed as one road by one agent, and substantially by one board of directors—they meet in common"—correct in a popular sense; if not, how otherwise?

(Same objections.)

Ans. It was correct in a popular sense.

Cross-int. 89. And is so still, is it not, as applied to the state of things existing under the joint-traffic contract while you were manager?

(Same objections.)

Ans. I think it does not apply and never did apply to settlements between the parties under the joint contract.

(Last part of answer objected to as not responsive and introducing an element not contained in the question.)

Cross-int. 90. I am unable to understand why, if the language used by you in 1863 was true when taken in its popular sense, it is not true in 1885, when also taken in its popular sense. Please explain what you mean by the distinction taken in your last answer.

(Same objections.)

Ans. My understanding of the previous questions is that one asks me how a thing applies in a popular sense and the other how it applies in a different sense.

Cross-int. 91. Once more, then, I ask is not the language used by you and above quoted just as true in 1885 and at this time, when taken in a popular sense, as it was in 1863, when first used by you; if not, why not?

(Same objections.)

Ans. It undoubtedly was as true in a popular sense in 1885; but I don't understand it as true at the present time, because the joint contract has been abrogated and different arrangements made since.

Cross-int. 92. If this contract were still in force and unexpired, and you were operating the two roads as joint manager at this time, as you were in 1863, would not the language you used in 1863, above cited, be true in a popular sense?

(Objected to as hypothetical, as based on alleged facts
188 which do not exist, and because the witness cannot form any judgment as to how he would act if the contract existed.)

Ans. If all the conditions surrounding it remained the same I see no reason why it would not be just as true now as then.

Cross-int. 93. It was then, in 1863, correct to say, in a popular sense, that the two boards of directors of these two corporations met in common, was it not?

(Objected to as new matter not inquired of in the direct.)

Ans. I am not quite prepared to say that it was correct.

Cross-int. 94. Did you not understand it to be correct when you first used this language in 1863, if you did use it?

(Same objections and as incompetent and immaterial.)

Ans. I presume I intended to make a correct statement.

Cross-int. 95. Did not the two boards of directors meet together in 1863 and hold such meetings jointly or in common once a month, as hereinabove set forth?

(Same objections and as offering to contradict the records of the Nashua and Lowell Railroad Corporation.)

Ans. That depends upon the construction to be put upon the words "jointly or in common;" they customarily met at the same time and place.

Cross-int. 96. In the record as made up by you as clerk of plaintiff corporation's directors of meeting held March 24, 1857, is contained this statement: "The board" (meaning the Nashua and Lowell board) "then went into joint meeting with the directors of the Boston and Lowell road." Was it not intended by you in what follows this statement in that record to signify that the business therein afterwards reported was passed upon or transacted by both boards of directors acting jointly or together?

(Objected to as new matter not inquired of on the direct, and because it is not competent for the clerk of a corporation to give his intention to contradict the record, and what the record is the record will show for itself.)

Ans. It was not.

Cross-int. 97. Please state what object was served by introducing into the record the fact that at a certain stage of the meeting the Nashua and Lowell board of directors went into joint session
189 with the directors of the Boston and Lowell road, if it was not intended thereby to signify that the proceedings of the Nashua and Lowell directors afterwards had at this meeting and recorded were participated in by the Boston and Lowell board of directors.

(Same objections.)

Ans. The meeting referred to was the earliest or one of the earliest occurring after the contract was entered into. The board transacted separate business of the Nashua and Lowell railroad, and then took up business which was of interest to both roads. The record was intended to show that when such business of interest to both roads was taken up the Boston and Lowell board was present, but it was not intended to mean that the two boards acted as one board, and the record does not purport to show the action of the Boston and Lowell board. As the term "joint meeting" was liable to misconstruction, it was at a later period not used in the records.

Cross-int. 98. Do you mean to say, as a matter of fact, that the directors of the Boston and Lowell board were present at the latter part of this meeting as mere spectators of the actions recorded as

transacted by the Nashua and Lowell board of directors, and when you say the record does not purport to show the action of the Boston and Lowell board, although it does show the presence of such board, do you mean that no action whatever was had by the Boston and Lowell board upon the matters recorded as acted upon by the Nashua and Lowell board at said meeting?

(Same objections.)

Ans. I do not mean that the Boston and Lowell board were present as spectators. That board had their own clerk, whose records are the evidence of what business they transacted. I do not mean to say that no action was had by the Boston and Lowell board at that time.

Cross-int. 99. According to your understanding, does not this record indicate that the action of the two boards after they came together was the same or similar, if both boards were present?

(Same objections and incompetent.)

Ans. I do not think it indicates it. I think it may properly be inferred that similar action was taken by the Boston and
190 Lowell board, but that inference cannot be verified by this record, but may be verified by the record of the Boston and Lowell board.

Cross-int. 100. Would you not expect to find in the record of the Boston and Lowell board meeting of that date, if now before you, a similar report of proceedings on the part of the Boston and Lowell board which were recorded by you as taken by the Nashua and Lowell board March 24, 1857?

(Same objections.)

Ans. I should expect to find in the records of the Boston and Lowell board that such board took substantially the same action as the Nashua and Lowell board on all matters of common interest under the joint contract.

Cross-int. 101. In your record of meetings of plaintiffs' directors held April 28, 1857; May 26, 1857; July 29, 1857; Oct. 27, 1857; Nov. 24, 1857; Dec. 29, 1857; Jan. 26, 1858; Feb. 23, 1858; April 27, 1858; May 25, 1858; June 22, 1858; Aug. 3, 1858, and Aug. 24, 1858, there are entries in the record kept by you that the board (meaning the Nashua and Lowell board), at a certain stage of proceedings in each case, went into joint session with the Boston and Lowell board. In all these cases would you not expect to find in the records of the Boston and Lowell directors of the same dates that the action taken by the two boards after coming into such joint session was the same or similar?

(Same objections.)

Ans. I should.

Cross-int. 102. In your answer to cross-int. 97, referring to the term "joint meeting" contained in the record of the Nashua and Lowell directors as kept by you, you say, As the term "joint meet-

ing" was liable to misconstruction, it was at a later period not used in the records. From this I understand that after a time you made up the records of the Nashua and Lowell directors, even when both boards were present and acting upon the same business at the same time, without stating the fact in your records of the presence of the Boston and Lowell board or of any participation by them in such action. Am I not right in supposing it true that the two boards of
191 directors were both present or in attendance at these monthly meetings for transaction of business arising under the joint contract, although no allusion to that fact was made afterward, or usually in the record of the doings of the Nashua and Lowell board as kept by you?

(Objected to as incompetent, and, further, that if the counsel supposes in his question that the witness stated that both boards were present and acting upon the same business at the same time without stating that fact in his record he supposes what the witness has never said.)

Ans. I think you have reasonable ground for supposing the Boston and Lowell board to be present when action was taken upon matters of joint interest under the contract.

Cross-int. 103. In omitting to state the fact of the presence of the Boston and Lowell board at such meetings in your record of the Nashua and Lowell directors' proceedings you did not then mean to signify that the Boston and Lowell board of directors were not also present and also acting on the same business as the Nashua board, did you?

(Objected to as to form and substance.)

Ans. With all respect to the question, I must answer that I am unable to see that an omission has any significance. If I wrote nothing in the record I don't see that any meaning can attach to what is not there.

Cross-int. 104. I understand you to have testified in your answer to cross-int. 97 that all reference to the fact of joint meetings which appeared in the record of the earlier meetings kept by you, after the execution of the joint contract, was afterwards studiously excluded from such records, not because the meetings were not joint, as they had been previously, but because the term "joint meeting" was liable to misconstruction as signifying, I suppose, something more, perhaps, than the mere presence of both boards of directors acting together in some way upon the same business at the same time. If it be true that all reference to the presence of the Boston and Lowell board of directors was avoided by you in your record of the proceedings of the Nashua and Lowell directors, for that reason am I not at liberty to suppose, and is it not true that in omitting all reference to such joint meeting in your records, you did not intend to negative
192 the fact of such joint meetings or to allow any one to infer correctly that the meetings afterwards held were not joint meetings just as much as those previously held and recorded

by you as joint meetings as clerk of the Nashua and Lowell directors?

(Same objections, and because there is no record produced that purports to be a record of a joint meeting or of joint action, except to discuss matters of common interest.)

Ans. I think I have previously stated my reason for dropping the words "joint meeting" from the records, and I see no reason for changing the explanation that I then gave of it. In answer to the latter part of the question I cannot agree that an omission or the absence of anything from a record means anything. It was no part of my business to record the action of the Boston and Lowell board, and my omission to do so can only be corrected by reference to the records of the Boston and Lowell directors.

Cross-int. 105. Of course your omission to refer to the presence of the Boston and Lowell directors at a meeting held by the Nashua and Lowell directors (if they were present) could not be corrected by resorting to the Boston and Lowell directors' records, and you seem to think that nothing can be inferred from the mere fact of an omission by you to allude to the Boston and Lowell directors as present. My inquiry is whether by such omission you meant to convey the impression to any one who should read your record that the Boston and Lowell directors were not present at such meeting. Please state whether you ever did intend to convey any such impression by dropping the words "joint meeting," or whether any one is at liberty to infer or argue from the absence of those words that the Boston and Lowell directors were absent from such meetings.

(Same objections, and, further, as incompetent.)

Ans. I think any one is at liberty to infer what might have been written, but never was written, in their own way, but that the inference should be confined to one particular thing that is not there does not appear clear to me. In the absence of language I did not intend to convey any idea whatever.

Cross-int. 106. You did not, then, I suppose, intend to convey the impression that the Boston and Lowell directors were absent from any of the monthly meetings held under the joint contract, did you?

(Same objections.)

193 Ans. When I did not refer to the Boston and Lowell board I did not intend to convey any kind of an impression about them.

Cross-int. 107. Last question repeated, with a request to the witness to answer it either affirmatively or negatively.

(Same objections.)

Ans. I didn't intend to convey any impression.

Cross-int. 108. These directors or some of them were in fact present at these monthly meetings, were they not?

Ans. I think they were.

Cross-int. 109. Invariably so?

Ans. My impression is that there may have been some exceptions.

Cross-int. 110. Do you mean that any action was ever taken by the Nashua and Lowell directors at one of these regular monthly meetings which were not attended by the Boston and Lowell directors or some of them?

Ans. As these meetings extended over a period of eighteen years while I was clerk of the board, it is impossible for me to recall all the instances without referring to the records themselves; but I have an impression that it has happened that action taken by one of the boards of directors when none of the other board was present has been concurred in by the other board at a subsequent or separate meeting.

Cross-int. 111. You are asked to compare with the record of Nashua and Lowell directors Defendants' Exhibit 4 for the purpose of showing the proceedings of the Nashua and Lowell directors' meeting held April 26, 1859, being one of the regular monthly meetings under the joint-traffic contract. It appears from this exhibit that a part of these proceedings were in joint session with the Boston and Lowell board.

(The plaintiffs' counsel says that, having proceeded thus far with his question to the witness, he was proceeding to finish his question by asking the witness to inspect what purports to be a copy of the record of the Boston and Lowell directors' meeting held April 26, 1859, or at the same time with the meeting of the Nashua and Lowell directors referred to in the exhibit, said book of records or copy of records being in his custody at the moment without previous
194 objection thereto, when he was informed by defendants' counsel that he must not make use of said transcript of records or show the same to the witness for the purpose of completing the inquiry begun as aforesaid by him. Plaintiffs' counsel thereupon yields to this denial on the part of defendants' counsel of the use of said records and finishes the question by asking the witness whether this recital is or is not conformable to the facts as they have taken place at this time.

Objected to as incompetent and immaterial, and to prevent misapprehension by the court defendants' counsel here states that he has repeatedly called upon counsel for complainants, who is president of the road, to produce, to be used as evidence, the records of the directors and stockholders of the Nashua and Lowell railroad which he has heretofore admitted to be in his possession. Counsel for complainants has uniformly refused so to do. During this examination counsel for complainants has opened what purports to be a copy of the records of the Boston and Lowell railroad directors and a copy of the records of the meetings of the Nashua and Lowell railroad directors, and asks to put in such part of such copy as he sees fit by interrogating witness thereon. To this counsel for defendants objects, but offers that if complainants' counsel will produce the books and records of the Nashua and Lowell Railroad Corporation

to be used as evidence in this case counsel for defendants will produce the original records of the Boston and Lowell Railroad Corporation for like purpose, and that such certified copies of the same as either party may desire may be put in evidence, reserving all rights of objection as to competency or materiality in matter of substance; or, if counsel for complainants will admit that the transcript of the records of the directors of the Nashua and Lowell Railroad Corporation found in the book from which he commenced to read is a true copy of such records from Sept. 22, 1858, to Nov. 18, 1878, and that it may be used as evidence in this case wherever the original would be competent, counsel for defendants will make the same admission with reference to the records of the Boston and Lowell directors, covering the same period of time, found in the same book.

Counsel for plaintiffs, in view of the statement of defendants' counsel just made on the record, desires to state that the book which he had in his hands when commencing the question just proposed
195 to the witness is a large volume marked on the back and front cover in these words: "Directors' Records, 1856–1878, B. & L. and N. & L. R. R'ds;" that in taking this book into his possession and using the same in his inquiry to the witness he understood and believes, and still understands and believes, that the book is the common property of the plaintiff and defendant corporations, and not of the defendant corporation alone; that this book was prepared under and by virtue of a vote passed at a joint meeting of the directors of both corporations held Sept. 26, 1876, referred to in the deposition of Charles E. Cram, taken for complainants in this case (printed page 100); that the book contains in parallel columns, side by side, the record of the doings of both corporations under the joint-traffic contract, and was intended to serve as a means of comparing those records, and if I recollect correctly the vote of joint directors passed Sept. 26, 1876, provides that the book, when so written up and completed in parallel columns, should remain in the custody of the manager for the joint and equal use of both corporations. I have frequently seen this manuscript copy of "Records of votes passed by the joint boards," as set forth in the vote passed Sept. 26, 1876, in the possession of the Boston and Lowell Railroad Company before it was bound up in its present form, and was never refused permission to refer to the same or use it for any legitimate purpose until I commenced to frame the question to put to the witness in this case. Upon the statement of defendants' counsel then made that this book was the sole property of defendant corporation, and that I must not use it for the purpose of such examination of the witness, I yielded to his refusal, and see no reason why I should enter into any negotiation with defendants' counsel concerning this matter.

Counsel for defendants asks counsel for complainants if he will admit that the book in question contains true copies of the original records as it purports to and may be used in place of the original records by either party, and offers that if he will make such admission and agreement defendants' counsel will withdraw all objection

to the use of the book so far as otherwise competent. Plaintiffs' counsel declines to negotiate on this subject, and desires an answer to be taken to the question.)

196 Ans. So far as relates to what was done as asking to compare the book in question with the exhibit referred to and the refusal of the defendants' counsel to allow such book to be used, I think the statement above made is correct, but said statement also contains some allegations as to what was in counsel's mind to do, about which I cannot answer.

(Adjourned.)

AUG. 29, 1885.

Cross-int. 112. Abandoning for the present my intention of using the copy of records of the directors of defendant corporation's doings under the joint contract, with a view of showing by comparison that the same votes were passed by both boards of directors at the monthly meetings held under the joint-traffic contract, although the fact of such joint action does not always appear in the records of such meetings as made up by the separate clerks of each board of directors (such use of these records being refused me by the defendants' counsel), I now ask your attention to the paper or exhibit attached to Int. 59, and purporting to be a copy of the record of the doings of a meeting of the Nashua and Lowell Railroad Corporation's directors held July 23, 1872, or of votes passed at such meeting; was not that meeting one of the regular monthly meetings held at the same time and place by the board of directors of both the plaintiff and the defendant corporations for the transaction of business arising under the traffic contract?

Ans. That was one of the regular monthly meetings of the two boards.

Cross-int. 113. Was any other than joint business transacted at said meeting, so far as you know?

(Objected to because the question imports that the vote passed was a joint vote, and also as new matter, not inquired of in the direct examination, and further objected that the record shows and is the best evidence of what business was transacted.)

Ans. So far as I know, no other business was transacted than business arising under the joint contract.

Cross-int. 114. Were you not present at this meeting, both in the forenoon and at two o'clock p. m., and did you not submit your usual monthly reports or financial statement? In your previous examination upon this subject, in answer to Int. 24 proposed to

197 you, as to whether the action then taken was participated in by the directors of both corporations, you answered, "I could not tell without referring to the records of the other corporation," meaning the defendant corporation's records. Since your previous examination Mr. Charles E. Cram, the clerk of the Boston and Lowell Railroad Corporation and of its directors, has been examined as a witness in this case, and has testified that the Boston and

Lowell directors' records of the meeting held July 23, 1872, are identical with that of the plaintiffs' directors, so far as relates to the vote then passed concerning the interest payment to be made to the defendant corporation from the receipts of the joint corporations on the cost of the new Boston stations, etc. Assuming the fact to be as testified to by Mr. Cram, I now repeat Int. 24 of your former deposition and ask you whether the action then (July 23, 1872) taken at Young's Hotel, and stated in your record as the action of the Nashua and Lowell corporation, was not participated in by the directors of both corporations?

(Objected to as new matter, and because it is not competent to recite former testimony, either of witness or another, upon which to base an interrogatory; and, further, that the record itself is the best evidence of what it contains; and, further, that the witness is asked to construe the record, which is only for the court.)

Ans. I was present at both sessions of that meeting, and presented my monthly report at the morning session. I have no doubt that the other corporation took similar action at the same time, substantially, but I have no evidence.

Cross-int. 115. Does not the fact as stated in your report or record of this meeting, that the subject of this vote of July 23, 1872, was presented by Judge Abbott, one of the defendants' board of directors, and not one of plaintiffs' board of directors, operate on your mind as evidence that both boards of directors participated in passing the same vote—that is, this vote?

(Objected to as incompetent for witness to state what operates upon his mind, inasmuch as he can only give his personal recollection of what passed at the time, so far as is competent.)

Ans. I cannot say that the fact that Judge Abbott was present produces that effect on my mind, but I have no doubt that
198 the Boston and Lowell board was present and took concurrent action upon the subject in question.

Cross-int. 116. Had not you and Judge Abbott been previously in consultation as to some mode of committing the Nashua and Lowell corporation to a participation in the cost of this new station then under construction, and was not this vote drawn or prepared by Judge Abbott with a view to carrying out such purpose?

(Objected to as incompetent.)

Ans. I had been in consultation with Judge Abbott as to the method of arranging for the Nashua and Lowell railroad to take an interest in or pay a portion of the interest upon the cost of the new passenger station, and the vote passed at the meeting was the result of our consideration of the subject. Whether Judge Abbott drew the vote, or whether I drew it and submitted it to his criticism, I do not now recollect.

Cross-int. 117. After you had been put in possession and control of those two roads for managing the same pursuant to the traffic contract, as the joint agent of both corporations, and a set of rules

or regulations had been adopted and agreed on, fixing your powers as those of entire control, how did the situation of the two roads differ, so far as their traffic and receipts and expenses were concerned, practically speaking, from that of a single road with one board of directors and one executive department?

(Objected to as incompetent.)

Ans. It differed in this, that I was subjected to the oversight and control of the two boards of directors acting separately in concurrence, and I might be removed by the unanimous vote of either board without the concurrence of the other.

Cross-int. 118. Were either of these limitations upon your power ever exercised or resorted to by the two corporations or either of them, or had any attempt been made to do this prior to July 23, 1872?

Ans. No such power was ever resorted to formally, but it frequently happened that plans were changed or abandoned on my part upon informal intimation that they would not be agreeable to one of the two boards of directors.

199 Cross-int. 119. At and before the framing of the vote of July 23, 1872, either by yourself or Judge Abbott, or both, were you not, as a business man (being more or less familiar with corporation law), aware that the plaintiff corporation, owning and operating its railroad between Lowell, Mass., and Nashua, N. H., under charters for that purpose only, could not lawfully devote its money or pledge its credit towards the construction of a passenger station in the city of Boston to belong to the Boston and Lowell corporation—I mean, of course, without additional legislation for that purpose?

(Objected to as incompetent and as not stating either fact or law correctly.)

Ans. I do not profess to be learned in the law. Long previous to this depot question in Boston the Nashua and Lowell railroad had invested its money in Boston freight facilities under advice of counsel, and I had no reason to suppose that that was done without legal authority. The question of such investment in or interest upon the passenger station, in so far as it was a legal question, did not come within my official province, but was wholly taken care of by the company's legal advisers.

Cross-int. 120. It seems to me you have not yet given any answer to the last question or the point intended to be there stated to you for answer, to wit, whether at or before July 23, 1872, you were aware that the plaintiff corporation, under its charter for owning and operating a road between Lowell and Nashua, and that alone, was not in law capable of contributing its funds or pledging its credit for the purpose of constructing a passenger depot in Boston, to be owned by the Boston and Lowell Railroad Company. The object of the question was to get you to state either that you were aware that such was the law of corporations or that such was not the law in 1872. Please answer the question as intended by me.

(Same objections, and counsel for defendants here states that the question is defective, as asking for an opinion in matters of law which witness has already said he knew nothing about; and, further, the attorney, by the question, formulates a position not shown by testimony, inasmuch as it appears that the complainant corporation simply paid the interest upon thirty-one per cent. of a certain sum during the continuance of a joint occupation and as
200 compensation for the use and benefit arising from the occupation of a passenger depot in Boston and other facilities owned by the defendant corporation.)

Ans. As I said before, I am not expert in law. My action in these matters was wholly governed by what was considered competent legal advice, and I respectfully decline to give any opinion as to what the law was or is.

Cross-int. 121. And you also decline, as I understand, to state what was your understanding of the law in this respect on or before July 23, 1872; am I correct?

Ans. I do not decline to state anything that I know, but I do not recollect of having any particular understanding in regard to this matter, as it was the business of others and did not come within my province.

Cross-int. 122. You did not in July, 1872, or before then, in considering the question of some method for charging the plaintiff corporation with some part of the cost of the new passenger station of the defendant corporation in Boston, consider it necessary to know or understand what limitations, if any, were imposed by law for restraining railroad corporations within their chartered limits in the expenditure of money, did you?

Ans. It was necessary that the directors should know, and undoubtedly they did know, through advice of their legal department. Probably I was at the time fully cognizant of what that advice was, but I have now no definite recollection about it.

Cross-int. 123. To whom do you refer as the legal adviser of the plaintiff corporation at that time?

(Objected to as immaterial.)

Ans. The legal advisers of the corporation were Col. John H. George, Judge Abbott, and Daniel S. Richardson, and sometimes others in consultation. I cannot say positively whether all three of these parties named consulted upon the subject under consideration, but I think it probable they did so.

Cross-int. 124. Were not these legal gentlemen just as much the legal advisers of the defendant corporation as of the plaintiff corporation in the matter referred to—that is, were they not retained by you in behalf of both roads under the joint contract and were not their services paid out of the joint income of the two roads?

201 Ans. Col. George was the salaried attorney for both roads and paid from the joint funds. The other two gentlemen were called in as occasion might require, but in matters of the two

roads of separate interests, Judge Abbott was counsel of the Boston and Lowell road, and paid by them, and Mr. Richardson was counsel of the Nashua and Lowell road, and I suppose paid by them.

Cross-int. 125. Do you recollect that any other counsel than Judge Abbott was conferred with or consulted by you or anybody else with regard to the legal bearings or aspects of the vote of July 23, 1872; and, if so, what others were consulted?

Ans. I think all three of the above-named gentlemen were consulted upon that subject, but Judge Abbott had the matter more especially in charge.

Cross-int. 126. Judge Abbott was then, July, 1872, I believe, one of the directors of the defendant corporation, also its legal counsel, and is the same person referred to in your record of the meeting of July 23, 1872, as having presented the subject to the meeting for consideration, was he not?

Ans. Yes.

Cross-int. 127. Have you now any recollection of the views then entertained or expressed by him on the point whether it was legally competent for the plaintiff corporation, through its directors, to assume any part of the cost of the new passenger station of the defendant corporation in Boston or to pledge itself to do so?

Ans. I have no recollection on that point.

Cross-int. 128. Am I not right in supposing that the method adopted in the vote of July 23, 1872, for committing the plaintiff corporation to sharing to some extent the cost of this new station was one which originated with you? I mean the plan of charging interest upon the entire cost of such station as expense of operating the two roads under the contract, and of taking this amount out of the receipts before the same were divided or apportioned between the two corporations in the ratio provided by the contract. If not, how otherwise?

(Objected to for form and substance, and because it does not correctly state the effect of the vote of July 23, 1872, as it purports to do.)

Ans. Quite likely the method indicated by the vote was
202 originally suggested by me, but I have not now any special recollection whether it was or not.

Cross-int. 129. Referring to the objection of defendants' counsel to cross-int. 120, which was in substance that the money so paid or payable by plaintiff corporation, under the vote of July 23, 1872, as interest upon thirty-one per cent. of a certain sum, etc., was paid as compensation for the use and benefit arising from the occupation of a new passenger depot in Boston, etc., belonging to defendant corporation, please state whether you concur on the point so taken by defendants' counsel that the money paid out under this vote or provided to be paid under the vote was paid or payable to the defendant corporation for the use by the plaintiff corporation of this Boston passenger station, and not as operating expenses of the two roads under the contract, as set forth in the vote.

(Objected to as incomplete and immaterial.)

Ans. I don't see, myself, any difference between money paid as rent for a station and money paid for operating expenses.

(Adjourned.)

SEPT. 1, 1885.

Cross-int. 130. It seems to me there is a clear distinction between money payable by one road to another as part of the expenses of operating that other road on joint account and the same money payable by one road to another as rental for any part of the other, as, for instance, its passenger station; that in the case of a participation in the operating expenses, only a traffic interest is involved, while the payment of rental for use of a passenger station creates an interest in the station itself or a right of occupying it as a tenant or joint tenant. Do you not perceive this distinction? Can you see that while the former of these contracts might be lawful and proper, as between two different railroad corporations, the latter might not be so?

(Objected to as incompetent, as asking the witness his opinion, and as argumentative.)

Ans. I am unable to see the distinction in either of the cases stated, because, in my mind, if the Nashua and Lowell Railroad Company recovered thirty-one per cent. of the income from
203 new improvements it would seem to me to be proper that it might by agreement pay thirty-one per cent. of the cost of maintaining such improvements.

Cross-int. 131. In one of your answers-in-chief you referred to the annual reports of plaintiffs' directors for 1872, 1873, 1874, 1875, 1876, and 1877 as containing evidence that, through statements in them contained, the plaintiffs' stockholders, who saw and read those reports, became notified of the fact that their money was being taken to pay rental for the use of the passenger station of the road of defendant corporation. I hand you the report of A. D. 1872, and wish you would point out in that report anything which seems to you to have conveyed such notice or information.

Ans. The report of May 29, 1872, I think, does not contain the matter in question, as it antedates the paying of rental.

Cross-int. 132. Does not the income and expense account, as made up and stated in that report for the year ending March 31, 1872, show, under the head of expenses, the sum of $42,066.42 as paid out for rent or rents?

Ans. It does.

Cross-int. 133. Is not the following statement found on the first page of that report, or at its beginning?

"The directors of the Nashua and Lowell railroad hereby submit to the stockholders their report for the year ending March 31, 1872.

Earnings and expenditures.

The proportion allotted to this company under its joint contract

with the Boston and Lowell Railroad Company of the gross earnings of the several roads operated by them is $557,862.05.

The ordinary expenditures and rents are $447,167.40."

(Objected to as incompetent and as calling for new matter.)

Ans. It is.

Cross-int. 134. From that statement is there anything to indicate any payments by way of rental for the use of any property of the defendant corporation?

Ans. Yes; the word "rents" used there, which may be rent to defendant corporation or something else; it don't say what.

Cross-int. 135. Do you not know, as a matter of fact, that during the year ending March 31, 1872, no sum whatever was paid
204 or payable from the plaintiff corporation to the defendant corporation in the nature of a rental payment? If there was any sum so payable by plaintiffs to defendant corporation as and for rent for the use of the property of the latter, state what the property so rented was and what the rent payable therefor was.

Ans. I do not know what the fact is, having no occasion to remember details for that long period of time, and not having referred to the books to refresh my memory.

Cross-int. 136. You do not, then, now recollect that there was any such rental payment due or payable before April 1, 1872, do you?

Ans. I do not.

Cross-int. 137. The term "rent" or "rents," as used in that report of 1872, might then have referred to rents of other property than that of the defendant corporation, might it not?

Ans. I think it might.

Cross-int. 138. Do you not recollect the fact that there were rental payments due or payable for other property before then leased or held by lease under the joint contract?

Ans. I do.

Cross-int. 139. In your answer to int. 129 you say, "I don't see, myself, any difference between money paid as rent for a station and money paid for operating expenses" (meaning, I suppose, under the facts and circumstances of the payments made in this particular case). If you were making up the accounts of a railroad for the purpose of determining what had been expended in operating the same, would you allow as any part of such operating expenses sums paid out by the corporation as interest on money employed in constructing such railroad or building stations on it?

(Objected to as incompetent.)

Ans. That would depend upon the circumstances governing the making of such account.

Cross-int. 140. If this money paid to the defendant corporation "out of the joint receipts of said two corporations, as provided in the vote of July 23, 1872" (Record, p. 82), could be properly treated as rent of the station, then it would follow, would it not, that the
205 Boston and Lowell Corporation might be the landlord, tenant, and owner of the same property at the same time?

(Objected to as incompetent.)

Ans. I don't see such necessary sequence.

Cross-int. 141. I understand, from the answers given by you in this examination, that you regard the twenty years' contract as embracing not only the traffic or earnings of the two railroads, but also as covering the real estate, tracks, stations, and superstructures of the two roads and making them also usable as common property for the purposes of the contract in the ratio fixed by the contract for the division of the income. In other words, that you make no distinction in this respect as between the income of the roads and the roads themselves so far as the provisions of the contract are concerned. Am I wrong in this?

(Objected to for form and substance as incompetent and immaterial and calling for the construction of a written instrument by the witness as a matter of opinion.)

Ans. The question is so complicated that I don't feel competent to answer it.

Cross-int. 142. Is it not in your belief possible that the term "operating expenses" was used in this vote of July, 1872, for the purpose of conveying the impression that such payments, if really expenses of operating, were legally justifiable under the contract, when, if their true character had been correctly set forth in the vote, such payments might or would not have been lawfully made—that is, to cover up or conceal the real character of the provision made for giving the defendant corporation the sums named in the vote?

Ans. I have no idea that there was any knowledge on my part of an intention in that vote to evade legal responsibilities or to cover anything up.

Cross-int. 143. Do you think this vote about operating expenses of both roads would have been just as valid in a legal sense, as you now regard it, if the money made payable to the defendant corporation had been therein called "rent for the use of its Boston terminals" instead of expenses of "operating the two railways under the contract?"

(Objected to as incompetent and immaterial.)

206 Ans. As I have said before, I am not a lawyer, and do not feel competent to give the legal opinion that is called for in this question.

Cross-int. 144. What is your reason for entertaining the idea (if you do entertain it) that these two corporations or either were, under the terms of this contract, using or occupying or enjoying the benefits of the real estate of the other, or that the separate real estate of either corporation was in any way placed in the possession, control, or occupancy of the other? What benefit could the plaintiff corporation have derived from the erection of this new station, unless the net income of the defendants' road had been thereby increased, and to the extent of thirty-one per cent. of such increase of income?

(Same objections.)

Ans. The question assumes me to entertain opinions that I do not remember to have expressed, and it is otherwise complicated and confusing, and I am unable to answer it.

Cross-int. 145. If you had understood that by the terms of the contract each corporation was bound to furnish and maintain its own railroad or plant and to keep it in the same relative condition of repair during the contract (as it was at the inception thereof), and that each road was entitled to its share of the net income of both under the contract without spending any more money upon its own railroad proper, would you then have considered it necessary and proper that the plaintiff corporation should have been called upon to contribute large sums in aid of the construction of the new Boston station of defendant corporation, without any increase of the amount or share of net income assignable to it under the joint contract?

(Same objection and as metaphysical.)

Ans. If the contract had been other than it is, as assumed in this interrogatory, it necessarily would have contained many provisions not referred to in the interrogatory, and I do not think the question is susceptible of being answered.

Cross-int. 146. The entire cost of the new station in Boston was $1,200,000, or thereabouts, was it not?

Ans. I am unable to state without reference to the books,
207 but I have the general impression that the cost of the station, including land and approaches, was about as stated.

Cross-int. 147. Thirty-one per cent. of the interest of this sum reckoned at seven per cent. would be $26,000 or so, would it not? And a payment of this sum by the plaintiff corporation to the defendant corporation was required yearly by the terms of the vote after the station was finished, was it not?

(Same objections.)

Ans. I cannot say, without reference to the books, what sum was used as basis of this calculation, and consequently I cannot testify as to exact figures. If we assume that the sum stated in the question is correct, the result stated is correct. I think the payment was required during each year, but the settlement was made semi-annually.

Cross-int. 148. Is not the yearly payment of $26,000, if correct in amount, equal to more than three per cent. upon the entire capital stock of the plaintiff corporation as it stood in 1872, when this vote was passed, and as it now stands?

(Same objections.)

Ans. I think the amount of stock of the Nashua and Lowell road at that time was $800,000, and three per cent. would be $24,000.

Cross-int. 149. Was not the old passenger station of the defendant corporation torn down and destroyed to give way to the new structure in part on the same site?

Ans. It was.

Cross-int. 150. Was not this old station worth or valued at $400,000 or thereabouts, and was not the plaintiff corporation, under the contract, entitled to thirty-one per cent. of the benefit of whatever income was obtainable from the use of this old station during the whole term of the contract?

(Same objections as before.)

Ans. I do not have in mind what the old station and land under it cost, but I think it was in the vicinity of half a million dollars. It formed a part of the property which was used for the benefit of the joint roads, under the joint contract, and in that sense
208 the Nashua and Lowell road received thirty-one per cent. of any direct or indirect income derived from it.

Cross-int. 151. By the destruction of this old passenger station, was not the plaintiff corporation deprived of all benefit of the income which would have been thereafter derivable therefrom had it not been torn down, or of thirty-one per cent. thereof?

(Same objections.)

Ans. No.

Cross-int. 152. Please explain this.

Ans. Because there was no interruption of travel. The new structure was erected over a temporary building; everything went on as usual to accommodate the public traffic. Further, there is no direct income from a passenger terminal station, but the accommodations it offers are vital to the inducement of passenger traffic, which pays its tribute in the form of tickets purchased for transportation.

Cross-int. 153. I think you misunderstood my inquiry, which was, whether, after the old station had been torn down and the new one built in its place, if the old station was worth a half million dollars or so, and if the plaintiff corporation was under the contract entitled to thirty-one per cent. of any benefits afforded by that old station during the continuance of the joint contract, and if the plaintiff corporation was by the vote of July, 1872, required to contribute thirty-one per cent. of the interest on the entire cost of the new station, this arrangement did not practically result in taking from the plaintiff corporation all the benefits which would have accrued to it under the joint contract, as sharer under the joint contract, in case the old station had been continued during the whole term of the joint contract, in the beneficial use of that old station?

(Same objections.)

Ans. I am unable to see it in the light stated in the interrogatory.

Cross-int. 154. Am I wrong in the impression that the thirty-one per cent. of net income assigned to plaintiff corporation by the contract was predicated in part upon the agreement contained in the contract that the defendant corporation was to maintain its passenger station at Boston during the term of the contract at its
209 sole expense and without any contribution from the plaintiff towards such expense in any way?

(Same objections.)

Ans. I do not recollect that the contract specifically states that in regard to the Boston passenger station, but I have no doubt that it was the expectation that the Boston and Lowell road should at its own expense complete its station in Boston, which was under construction at the date of the contract in 1857, without special charge to the joint roads. So far as new and greater structures might subsequently be demanded to accommodate increased business, I think the question of future agreements in regard thereto was an open one in the same manner as it was left open in art. 8 of the contract relative to the rebuilding of structures destroyed by fire, which article provides that in case of fire the owner of the building destroyed shall not at its separate cost be required to erect a more expensive building in any case than the one injured or destroyed.

Cross-int. 155. Do you think the case provided for in art. 8 of the contract, relative to destruction of property by fire, should apply to the case of a destruction of property used for joint purposes and destroyed by the act of the owner?

(Same objections.)

Ans. I thing it applies so far as this, that it indicates the intention of the parties to the contract to leave the question of future enlargements of terminal facilities open to future amendments of the contract.

Cross-int. 156. Would it not, in your understanding of the contract, require an amendment of such contract in order to commit the plaintiff corporation to any contribution toward the expense of a more valuable passenger station at Boston than was the old passenger station of defendant corporation provided for in art. 6 of the contract?

(Same objections, and because the opinion of the witness, however valuable in other legal matters, cannot be taken upon the construction of a railroad contract and the powers of the different corporations thereunder.)

Ans. I supposed at the time and still suppose that the action taken between the two companies in 1872, as appears by the
210 records, relative to the Boston passenger station and other new structures was necessary to bind the respective parties to the settlements subsequently made.

Cross-int. 157. You mean, then, I suppose, that the action taken between the two companies in 1872, referred to by you, amounted to some addition to or change in or modification of the terms of the joint-traffic contract, do you not? If this was not your meaning, state what was your meaning in this respect.

(Same objections.)

Ans. I meant as stated in the question, substantially.

Cross-int. 158. I understand you as saying that in erecting the new station at Boston more land was taken and a larger station built than was necessary for the passenger business of the two roads

operated under the joint-traffic contract, and that it was originally expected that the Eastern railroad would occupy a portion of the new station; that there was room enough in the new station to accommodate the Eastern road and the defendant corporation also. Am I correct? If not, how otherwise?

(Objected to as not stating correctly what witness said.)

Ans. I am unable to recall the exact language that I made use of in the testimony referred to. There was a necessity to take all the land that was taken; otherwise buildings on land so taken and lots would have been cut in two. It was thought most judicious to utilize the land so taken by building upon the greater part of it, although such new building might be larger than required by the then immediate wants of the passenger traffic of the two roads. To provide temporary income on this excess of structure until the traffic of these two roads so increased as to require all of it, a portion of the station was leased to the Massachusetts Central Railroad and negotiations were entered into with the Eastern railroad to temporarily accommodate the Boston terminal passenger traffic of that road. These negotiations with the Eastern road fell through, owing to a disagreement as to the amount of rental to be paid by the Eastern Company.

Cross-int. 159. Were not these negotiations with the Eastern railroad continued till the summer of 1873, or until the new station was nearly finished and opened for use?

211 Ans. I think they were.

Cross-int. 160. If your new station was large enough thus to accommodate the Eastern railroad was it not about twice as large as was actually necessary for the joint passenger business of the two roads at the time the same was built?

Ans. I think not, because I think the capacity of a station for accommodating business increases in a greater ratio than the increase of dimensions. If the Eastern road had made use of it the use would have been in common, and doubling the size of the station, under those circumstances, would enable it to accommodate more than double the business.

Cross-int. 161. You do not probably mean to be understood as saying that the track-room, or room used for tracks in the train-house of the new station, would have been used by both your road and the Eastern road in common at the same time had this arrangement with the Eastern railroad been made, do you?

(Same objections.)

Ans. I mean to say that had this arrangement been made the movement of all trains in and out of the station would have been under the control of one man, and he would have used the tracks for each and either road as might best accommodate their separate time-tables.

Cross-Int. 162. Please state how it would be possible for a single man in charge of this new station, if so used by both corporations, tracks as well as platforms, to accommodate two trains, both leaving

the station at the same time on the same track, and if a single person in charge of the station, in order to avoid this difficulty, would not also have to be in control of the time-tables of both roads, and whether the proposed contract with the Eastern road contemplated this state of things.

Ans. The state of things set forth in the interrogatory is of itself impracticable; but the arrangement proposed with the Eastern road was entirely practicable. The station contained numerous tracks, and was and is so arranged that more tracks can be added without inconvenience. A man having control of trains in a station need not have control of the time-tables at all of either road. It would have been perfectly practicable for him to have received
212 and sent out the trains of both lines at such hours as either line might desire.

Cross-int. 163. With all the space now available for track room in this new station, could not the train-house be made sufficient without enlargement to accommodate the Eastern railroad and the defendant road with separate tracks of their own as the business existed in 1872 and 1873?

Ans. I think not. Possibly by putting on the wings and reducing the width of platforms that might have been done; but I do not think such changes were in contemplation at the time.

Cross-int. 164. By wings you mean, I suppose, merely the laying of tracks, provision for which had already been made in the construction of the new station, though outside the walls of the train-house, do you not?

Ans. No; I mean more than that. I mean the construction of exterior walls and roofs for two sheds, one each side of the train-house, the dimensions being, as I recollect them, for each shed about five hundred and seventy-five in length and forty feet in width, and the laying of tracks in such sheds as well as additional tracks in the main train-house.

Cross-int. 165. And this could have been done at comparatively small expense, could it not?

Ans. Yes, comparatively so.

Cross-int. 166. Did not the Eastern Railroad Corporation offer defendant corporation $50,000 a year for the use of such accommodation as it wanted in the new station?

Ans. I think they did.

Cross-int. 167. And this offer was declined by the defendant corporation and the sum of $60,000 a year asked for such accommodation, was it not?

(Objected to as before.)

Ans. Mr. Crowninshield, who was the president of both corporations, the plaintiff and defendant in this case, declined to agree with me upon the expediency of accepting that offer, and requested me to ask of them $60,000 per annum, which I did, and the Eastern road declined to pay $60,000 per annum, and, further, withdrew their

offer of $50,000 per annum; all of which appears in writing
213 in the correspondence between Mr. Crowninshield and myself and between the manager of the Eastern railroad and myself.

Cross-int. 168. Was not the yearly tax levied on the new station in the city of Boston, after it was finished, much greater in amount than was the tax which had been levied on the old passenger station before it was taken down, and was not thirty-one per cent. of this increased tax afterward charged to the plaintiff corporation so long as you remained manager?

(Same objections.)

Ans. I only recollect that there was some difficulty about taxes upon property in Boston, about which the treasurer of the Boston and Lowell road corresponded with me after I left the road, and through that correspondence I had reason to believe that there was some error in making up the tax account, and that error was adjusted between the two companies. I do not definitely recollect whether the taxes on the passenger station was [were] included in this tax controversy or not.

Cross-int. 169. Was not the assessors' tax valuation of the Boston real estate increased to the amount of $735,000 between 1873 and 1875? (See reports 1873 and 1875, pp. 7 and 11.) If not, how otherwise?

(Objected to as incompetent and as undertaking to put in the contents of a report not inquired about in the direct examination.)

Ans. The reports handed me and referred to show that difference in valuation between the years 1873 and 1875.

Cross-int. 170. Was not the year ending Sept. 30, 1874, the first financial year after the completion of the new passenger station in Boston; and did not the receipts of the defendant corporation from the passenger business of that year fall off to the extent of $15,794.36, as compared with the receipts from passengers the preceding year; or does not defendants' directors' report show this?

Ans. It was the first year after the completion of the depot. The report shows that more passengers were carried that year than the previous year; but owing to some slight reductions in the tariff and to a larger proportion riding on season and other cheap tickets the passenger revenue fell off, as above stated.

Cross-int. 171. For the financial year ending Sept. 30, 1875,
214 were not the passenger receipts of the defendant corporation, according to report of defendants' directors, less by $14,567.75 than for the preceding year? In the next year, 1875–'6, did they not still further fall off to the amount of $43,594.75?

(Same objection.)

Ans. Yes; for reasons stated in the reports.

Cross-int. 172. If, in the three years next after the completion of the new Boston passenger station, the gross receipts of the passenger business fell off or became less by $73,956.86 than it was before the new depot was finished, is it true that the plaintiff corporation, as

entitled to thirty-one per cent. of these earnings under the contract, could have received for those three years—*i. e.*, to Sept. 30, 1876—any benefit from the construction of the new passenger station in Boston?

Ans. I think it may have received a benefit by the construction of the station, notwithstanding the falling off in business. The business depression was very great at that time and competition was active, and if it had not been for the greater facilities of the new station the falling off in passenger traffic might have been greater than it was.

Cross-int. 173. In your answer to Int. 57 (Exhibit 21) is a copy of your record of the meeting of directors of plaintiff corporation held Feb. 6, 1871, and of a vote passed in these words: "That Mr. Crowninshield, of this board, Judge Abbott, of the Boston & Lowell board, and the manager be a committee on behalf of these corporations, with power to execute such contracts in connection with the other roads in the line and with the Ogdensburg & Lake Champlain Railroad Co., the Northern Transportation Co., and the trustees who may hold the property of said last-named Co., as may, in their judgment, tend to promote our interests by retaining and fostering the business of the Western lakes in connection with Boston and other New England points." At the beginning of the record of this meeting these words are found: "The directors of the Boston & Lowell Railroad Co. were present in joint session." Was not that vote submitted to both boards of directors sitting together at the same time and at the same table, or jointly and not separately, as for the separate action of two boards of directors?

215 (Objected to as incompetent.)

Ans. My memory doesn't serve me as to the exact particulars of how any vote was put at that period.

Cross-int. 174. Was not the action so recorded by you as taken at this meeting joint action of the two boards and not separate action of each board upon the same proposition or subject-matter? Was it not your intention by introducing into this vote the words "a committee on behalf of these corporations" and the words "tend to promote our interests" intended to signify that the directors of both corporations united in the passage of the vote at the same moment of time instead of the vote being passed upon separately by each board of directors at different moments of time? If not so, state how otherwise.

(Objected to as incompetent.)

Ans. My record, as shown, was not intended to indicate any action of the Boston and Lowell board, and I do not think that the Boston and Lowell board acted otherwise than concurrently upon the question.

Cross-int. 175. Did you not act as one of the committee appointed by this vote and sign contracts or instruments as one of such committee? And did you not under such appointment sign an instrument dated Aug. 29, 1871, a copy of which is now shown you, the

signature of which, on the part of yourself and the other members of the committee, was in these words? "Boston and Lowell and Nashua and Lowell Railroad Corporations, by F. B. Crowninshield, Geo. Stark, J. G. Abbott, committee."

(Objected to as before, and new matter.)

Ans. I have no doubt I did sign as shown.

Cross-int. 176. If you were not acting under a vote passed by the joint action of the two boards as distinct from the separate action of each board, would you not have considered it proper that the signatures affixed to this document, in behalf of the two corporations, should have been made by the committee of each and not as by the committee of both?

(Objected to as incompetent, and new matter.)

Ans. Not necessarily so, as the contract in question was a traffic contract in which both parties were interested, and the re-
216 ceipts therefrom were a part of the joint income of the Boston and Lowell and Nashua and Lowell roads to be adjusted under their own contract of 1857.

Cross-int. 177. Had not the train-house of the new passenger station been put under contract and become well advanced in construction prior to Dec. 15, 1871?

Ans. I have no doubt it was so, although my memory does not serve me as to the exact date. It is so stated in the report of the Boston and Lowell railroad at that time, and I have no doubt it is correct.

Cross-int. 178. On or before Jan. 1, 1872, had not adequate provisions been made by both corporations, acting together and at their joint expense, for increasing the freight terminal facilities at Boston, so as to retain all the freight traffic coming to them from the upper roads, so called, extending as far west as Ogdensburg by rail and extending westerly of Ogdensburg by a line of steamers belonging to the Northern Transportation Company of Ohio?

Ans. Yes.

Cross-int. 179. Nothing more, then, was necessary to be done to accommodate the freight business of the two roads at Boston, was there?

Ans. The property had been purchased, but it required further outlays on much of it to prepare it for freight use, such as walling and filling flats, dredging, etc.

Cross-int. 180. Was there, prior to Jan. 1, 1872, any difficulty, by reason of there being in the old passenger station less room or space than the then passenger business required for the discharge from the cars or admission to the cars of passengers wishing to leave or take them—that is to say, could not all passengers carried get access to or egress from the cars through the old station or the doorways and openings therein without difficulty?

Ans. There was great difficulty in accommodating the travel. The station was once enlarged after its original construction, and before 1872, and such enlargement covered all the ground available

for the purpose, notwithstanding which the business outgrew the accommodations, and it became difficult to transact it satisfactorily.

217 Cross-int. 181. Was not the old station as large in proportion to the number of passengers using it at that time as any other railroad passenger station in Boston; if not, what other one was larger in proportion to the number of passengers carried?

Ans. I cannot say. I only know that other railroads were moving in the direction of enlarging their passenger stations, and some of them did enlarge them greatly.

Cross-int. 182. Were not directors Spalding and Sigourney of the plaintiff corporation stockholders at the same time in the defendant corporation?

Ans. I am not able to state.

Cross-int. 183. In the contracts existing after February, 1870, for the business of the upper roads as far west as Ogdensburg was it not provided that a terminal charge of thirty cents a ton should be allowed on freights at Boston and East Cambridge and Burlington and twenty cents per ton at all other stations? Had this terminal charge on freight anything whatever to do with the erection of the new passenger station at Boston subsequently?

Ans. I think the terminal charge was as stated, and I also think, as I have already testified, that the erection of a passenger station was under consideration when that terminal charge was fixed.

Cross-int. 184. Are you not wrong in your answer to Int. 19 in stating or intimating that this terminal charge of thirty cents per ton on freights at Boston was allowed by the upper roads in consideration, in part or in whole, of the building by defendant company of its new passenger station at Boston, or that the two things had any connection whatever with each other? Before answering this question please look at art. 11 of the articles of association adopted at the meeting of the Vermont Central railroad line Jan. 13, 1865.

(Counsel for defendants objects to the question as incompetent and to the witness's refreshing his recollection by inspection of a document not written by him and of which he has no knowledge, and objects to the contents of such document.)

Ans. The document put in my hands relates only to business to and from the Western lakes. On that business it was agreed in 1865 that thirty cents a ton should be the terminal charge in Boston.

(Competency of answer objected to by counsel for defendants.)

218 Cross-int. 185. Was there not a contract between the plaintiff and defendant corporations and the upper roads, so called, made in 1870 or thereabouts, in which it was provided that there should be terminal charges on freight handled at different points along the whole line of the road, at least at Boston, at Burlington, and elsewhere, and did not that contract provide that the Boston terminal charge should be thirty cents per ton?

(Objected to as incompetent and as asking for secondary evidence.)

Ans. I think there was such a contract at or about the time named, but my memory doesn't serve me as to exactly when it was made.

Cross-int. 186. Did the plaintiff corporation under the joint contract get any more benefit from these terminal freight charges than it would have got from them had no new passenger station at Boston been built?

Ans. I think it did.

Cross-int. 187. How so, if the terminal charges had been fixed by contracts existing before the passenger station was built?

(Objected to as assuming that all terminal charges had been fixed.)

Ans. The question of improved passenger accommodations at Boston was under consideration informally several years before it took definite shape, and more or less entered into the adjustment of freight differences with the upper roads.

Cross-int. 188. Did the passenger business of the upper roads require any greater facilities at Boston than the old passenger station furnished?

Ans. Yes.

Cross-int. 189. Where did the passengers come from in such numbers as to require larger accommodations than the old station afforded?

Ans. They were gathered from about one thousand miles of connecting roads that ran their cars into this station.

Cross-int. 190. You seem in your answer to include all passenger cars coming into this station. My question referred only to such passengers as came from points beyond Nashua. Do you mean that passengers coming from points beyond Nashua into the old station could not be properly accommodated by the area of such old station?

219 Ans. I do.

Cross-int. 191. Please indicate in particular from what points above Nashua any considerable number of passengers were in the habit of coming to Boston into this old station—I mean cities or large towns from which any considerable number of passengers were in the habit of coming to Boston.

Ans. I couldn't answer that without taking maps and naming all the large towns that are on the lines of railroads that are tributary to the Boston and Lowell railroad.

Cross-int. 192. In your answer to Int. 31 you say you submitted to the directors of the Nashua and Lowell Railroad Company plans of the new passenger station, meaning plans of the new passenger station at Boston; whether or not you did so at any time or in any manner or sense different from that in which you submitted plans to the directors of the Boston and Lowell Railroad Company—that is, were not these plans submitted to the directors of the defendant

corporation just as much as to the directors of the plaintiff corporation?

Ans. My recollection is that Mr. Codman, of the Boston and Lowell board, was requested by that board to advise with me in relation to those plans, and that Mr. Sigourney, of the Nashua and Lowell board, was requested by that board to confer with me on the same subject. I had a great many interviews with each of these gentlemen in regard to perfecting the plans. Sometimes they were together and sometimes separately with me, and when we had substantially agreed what to lay before the directors the plans were presented to each board for its consideration. Quite likely when they were so presented the two boards were together in the same room, but as to that I have no definite recollection.

Cross-int. 193. Have you any recollection that you ever presented these plans at a meeting of the Nashua and Lowell directors at any time when the directors of the Boston and Lowell road or some of them were not present?

Ans. I may have done so or I may not; my recollection is not definite about it.

Cross-int. 194. Have you any recollection about it that is indefinite—that is, have you any recollection that you did present
220 these plans to the Nashua and Lowell board of directors at a separate meeting of that board? If so, state when and where that meeting was held, as near as you can.

Ans. I recollect showing models and plans and estimates to individual members of the Nashua and Lowell board at various times, but I do not recollect submitting the matter for any formal action by the Nashua and Lowell board, except when members of the Boston and Lowell board would be present.

Direct examination resumed:

Int. 195. In your cross-examination, in two instances you have used the words "concurrent action of the two boards of directors." Please state in what sense you used the word "concurrent."

(Objected to unless the witness used it in some sense different from the ordinary one.)

Ans. I used the word "concurrent" because it occurs in the contract between the two companies, in that part relating to the control which the two boards have over the manager, and I understand it to mean the agreement of two boards of directors separately upon a subject under consideration by both.

Int 196. You speak of the fact that the Massachusetts Central ran into this new station and paid rent therefor. To whose benefit did that rental accrue, and in what percentage or proportion?

Ans. The rental, if paid, was to go into the joint income of the two roads. I do not, of my own knowledge, know whether it was paid or not, as I went out of employ of the roads at about that time.

Int. 197. What connection had the Mr. Crowninshield who you

say rejected the offer of $50,000 rental from the Eastern railroad with the Nashua and Lowell road?

Ans. Mr. Crowninshield was the president of the Nashua and Lowell road, and had been since about 1857.

Int. 198. Was the rejection made with a purpose of cutting off all negotiation with the Eastern, or was it made to get a larger percentage?

Ans. It was made with hope of getting a larger rental.

Int. 199. If that arrangement had not been rejected by Mr. Crowninshield, who would have had the benefit, if any, arising from the payment of the rent during the continuance of the joint contract?

221 Ans. The Nashua and Lowell road would have received thirty-one per cent. of it.

Cross-examination resumed:

Cross-int. 200. The words "concurrent action" as used by you are, as you say in your answer to Int. 195, understood to mean "an agreement of two boards of directors separately upon a subject under consideration by both." If, then, action was taken by the two boards of directors of the plaintiff and defendant corporations in this case, acting jointly or together, at one and the same moment of time, such action would not be concurrent action, according to your understanding of the term, would it?

(Objected to as incompetent and argumentative.)

Ans. This is apparently to me a suppositious inquiry, and, as such, I am not prepared to answer it intelligently.

Cross-int. 201. I think it already appears from your former deposition taken in this case, answer to Int. 26 therein, that at the time that deposition was taken you had no recollection whether the vote of July 23, 1872, was submitted to both boards of directors at one and the same moment of time and as a single proposition for a joint and simultaneous action, or was separately submitted to the members of each board of directors for their distinct and separate action therein successively. Have you now any more recollection on that point than you had when you gave your former testimony in this case?

Ans. I think I do recollect more about it, because I have given it more attention.

Direct examination resumed:

Int. 202. Have you had means of refreshing you recollection since that time, by reflection or otherwise?

Ans. I have.

Int. 203. From the best recollection that you now have, do you say that the vote appearing upon the records of the Nashua and Lowell Railroad Corporation of July 23, 1872, was passed by any other persons than those appearing by said record as being present and acting as the directors of the Nashua and Lowell Railroad Corporation?

222 (Objected to, first, as leading; second, as not matter of reply to anything called out on cross-examination, and therefore not competent.)

Ans. I do recollect that the Boston and Lowell board was there, and I think they passed a similar vote; but it was not my duty to record it on their behalf.

Int. 204. Now, state what your best recollection is as to whether any other person or persons than the Nashua and Lowell directors, who appear by the record to have been present and voting, participated in the act of voting when the vote was passed by the Nashua and Lowell directors.

(Same objections.)

Ans. I think nobody participated in the vote except the Nashua and Lowell directors.

Cross-examination resumed:

Cross-int. 205 (*de bene*). Do I understand you as meaning to say by your last answer that you recollect now, as you did not when you gave your former deposition in this case, that nobody participated in the vote of July 23, 1872, except the directors of the Nashua and Lowell railroad, or do you only mean to say that, as a result of thinking over this matter and talking it over with the defendants' counsel in this case, you have come to the conclusion in your own mind, independently of memory, that no one but the Nashua and Lowell directors took part in the passage of this vote?

Ans. I answer, first, that I feel uncertain as to whether I am quoted correctly in the interrogatory; next, that I have had no conversation with the defendants' counsel to influence my recollections in this matter; and, further, that since my attention has been called to the matter now in hand, brought to my notice some two weeks since, I have looked over many old drafts and letter books and records of that period, some of which are in my own writing, and many of which drafts are in my possession at my own house, and through such examination I have been enabled to recall much more relating to the subject in hand than I could recollect at my former examination.

GEO. STARK.

Attest: JOHN G. STETSON, *Examiner.*

223 BOSTON, *Sept.* 2, 1885.

Counsel for defendants puts in evidence from the paper marked for identification "Report (1872), J. G. S., ex'r," in connection with the deposition of George Stark, being the Thirty-seventh Annual Report of the Directors of the Nashua and Lowell Railroad Corporation, May 28, 1872, pages numbered 3 to 8, inclusive, and the same are marked "Defendants' Exhibit 24, J. G. S., ex'r."

Also from paper marked for identification "Report (1873), J. G. S., ex'r," being the Thirty-eighth Annual Report of the Directors of

the Nashua and Lowell Railroad, pages numbered 3 to 11, inclusive, and the same are marked "Defendants' Exhibit 25, J. G. S., ex'r."

Also from paper marked for identification "Report (1874), J. G. S., ex'r," being the Thirty-ninth Annual Report of the Directors of the Nashua and Lowell Railroad, pages numbered 3 to 9, inclusive, and pages numbered 12 to 16, inclusive, and the same are marked "Defendants' Exhibit 26, J. G. S., ex'r."

Also from paper marked for identification "Report (1875), J. G. S., ex'r," being the Fortieth Annual Report of the Directors of the Nashua and Lowell Railroad, pages numbered 3 to 6, ending on page 6, and the same are marked "Defendants' Exhibit 27, J. G. S., ex'r."

Deposition of Charles L. Tilton.

Direct examination by A. A. STROUT, Esq., of counsel for defendants:

BOSTON, *Sept.* 2, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Charles L. Tilton; eighteen; Lowell, Mass.; clerk in treasurer's office of the Boston and Lowell Railroad Corporation.

Int. 2. Please examine the paper marked "Defendants' Exhibit 28, J. G. S., ex'r," and state whether or not you this day gave in hand, in presence of the examiner in this case, the original notice, of which said exhibit purports to be a copy, to Francis A. Brooks, Esq., counsel for complainants in this case; and, if yea,
224 whether or not said exhibit is an exact copy of said original notice so given to Mr. Brooks.

Ans. I did. That is a copy.

(Paper marked "Exhibit 28" is put in evidence by counsel for defendants.)

Cross-examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

Cross-int. 3. Independently of information derived from Mr. Strout since you came into this room, did you know my name?

Ans. I knew who Mr. Brooks was—that is, if I understand your question.

Cross-int. 4. Do you mean that you knew to whom the name of Francis A. Brooks belonged by personal knowledge of his identity before you learned this from Mr. Strout?

Ans. No, sir; I did not.

CHARLES L. TILTON.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of William W. Bailey.

Direct examination by A. A. STROUT, Esq., of counsel for defendants:

BOSTON, *Sept.* 2, 1885.

Int. 1. Please state your name, and if you have previously testified in this cause.

Ans. William W. Bailey; I have.

Int. 2. Are you acquainted with Francis A. Brooks, now present in this room?

Ans. I am.

Int. 3. Were you present when Charles L. Tilton deposed in this case—the witness whose deposition was just taken?

Ans. I was.

Int. 4. Were you present when said Tilton handed the paper to which he has testified in said deposition to F. A. Brooks, and did you hear the same read in the presence of said Tilton?

225 Ans. I was so present and did hear said paper read.

Int. 5. State whether or not said F. A. Brooks, to whom such paper was handed, is the identical F. A. Brooks who appears as counsel in the present cause.

Ans. He is.

Int. 6. What relation, if any, does he sustain to the Nashua and Lowell Railroad Corporation besides that of counsel?

Ans. That of a director and president.

Int. 7. Please state whether or not you have been summoned to appear before the examiner to give your testimony in this case, and to bring with you the books of records of all meetings of the directors of the Nashua and Lowell Railroad Corporation from the first day of January, 1853, to the first day of January, 1885, and all records of the doings of the directors of said Nashua and Lowell Railroad Corporation from said Jan. 1, 1853, to Jan. 1, 1885, inclusive?

Ans. I have been so summoned.

Int. 8. Where were you when you were so summoned?

Ans. In this room, No. 9 of the Boston and Lowell railroad station in Boston.

Int. 9. Whether or not you were tendered and received your fees for such attendance as a witness; and, if yea, to what amount.

Ans. I received $5.50 as such fees.

Int. 10. How far is the place where you reside from the place of the caption of this deposition?

Ans. I understand it to be forty miles by railroad.

Int. 11. After being so summoned, state whether or not you returned to your home in Nashua, and came from Nashua to Boston to-day to give your deposition.

Ans. I did.

Int. 12. Please examine the subpœna now shown you and state whether or not you are the person therein named and summoned

to give your deposition and bring with you the papers therein referred to.

Ans. A copy of that subpœna, certified to by the United States marshal, was served on me, and I have no doubt I am the William W. Bailey therein named.

226 (Counsel for defendants puts in evidence the subpœna referred to, and the same is marked "Defendants' Exhibit 29, J. G. S., ex'r.")

Int. 13. What relation do you sustain to the Nashua and Lowell Railroad Corporation, the complainants in this cause?

Ans. I am a director and clerk of the board of directors.

Int. 14. Whether or not you know of a by-law of the Nashua and Lowell Railroad Corporation relating to your appointment as clerk.

Ans. I do.

Int. 15. Is such by-law found in this Record, on pages 77 and 78, being article 5?

Ans. It is.

Int. 16. How long have you been clerk of the board of directors of said corporation?

Ans. I think since 1875.

Int. 17. And have you kept the record of the directors during that time?

Ans. I have.

Int. 18. Whether or not, when you gave your deposition Nov. 19 and 26, 1884, you produced or had in your hands a book of records of the board of directors of the complainant corporation which was used in this cause and extracts made from it.

Ans. I did have in my hands one of the books of record of Nashua and Lowell Railroad Corporation's board of directors.

Int. 19. State what period of time said book covered, as near as you remember, and describe its general form and appearance.

Ans. My impression is that it covered the time from about 1867 or 1868 to about 1877 or 1878. It was a bound book of small size for a record book.

Int. 20. Whether or not said book purported to contain and did contain the records of the doings of the board of directors of the Nashua and Lowell Railroad Corporation during the time you have stated, from about 1867 or 1868 to 1877 or 1878.

Ans. It did.

Int. 21. From whom did you receive or where did you get the book when you gave your deposition in this case?

227 Ans. My impression is that Mr. F. A. Brooks, the president of the corporation and counsel, produced it.

Int. 22. Whether or not it is your duty as such clerk to keep books of record wherein you record the doings of the directors at their several meetings.

Ans. I understand it to be my duty so to do, under the by-law above referred to.

Int. 23 I now call upon you to produce said book of records, to

be used as evidence in this cause, in accordance with the summons issued by the circuit court of the United States and returned at this hearing, and marked "Exhibit 29."

Ans. That book has been in the hands of Mr. Brooks, the president of and counsel for the Nashua and Lowell Railroad Corporation, I think, since the commencement of litigation between parties to the present suit. Since the summons was served upon me in this case I have asked Mr. Brooks for the book, and he informs me that, in his judgment, the clerk of the Nashua and Lowell Corporation is the proper custodian of that book, and will produce it when called for.

Int. 24. Where is said book at present, if you know, or where do you have reason to believe that it is?

Ans. My impression is it is in Mr. Brooks's possession.

Int. 25. Is Mr. Brooks, the president of the Nashua and Lowell Railroad Corporation, present in this room?

Ans. He is now in this room.

Int. 26. As clerk of the directors of said corporation, will you ask Mr. Brooks to hand you the record inquired for, in order that you may produce it, in obedience to the summons of the court?

Ans. I will.

Int. 27. Please do so, and state the result of your question.

Ans. I have asked Mr. Brooks for the book, and he has handed it to me.

Int. 28. Please examine the book now produced and in your hands, and state what the same is and what period of time it covers.

Ans. It is the record of the clerk of the board of directors of the Nashua and Lowell Railroad Corporation. The date of the first meeting appears to be June 17, 1867, and the date of the last meeting Feb. 26, 1878.

228 Int. 29. Do I understand you to produce this record in obedience to the summons of the court, to be used, so far as competent, as evidence in the pending cause?

Ans. This is one of the books called for in the summons, and I have it now in my hands.

Int. 30. Do you produce it?

Ans. I have it here.

Int. 31. State whether this is a book of original records.

Ans. I so understand it to be, and it is as far as I have kept it, which is about half the book.

Int. 32. Do you know the signature of George Stark?

Ans. I do.

(It is agreed that the witness may read from this book of records such portions as he may be requested to read, and that the examiner shall take down the same, and the same shall have the same effect in evidence as if the original book was put in evidence, subject to all objections to the materiality and competency thereof.)

Int. 33. I request you to read the record of the meeting of Nov. 26, 1867, found on page 11 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 30, J. G. S., ex'r," by consent.)

Int. 34. I request you to read the record of the meeting of Sept. 22, 1868, found on page 22 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 31, J. G. S., ex'r," by consent.)

Int. 35. I request you to read the record of the meeting of Sept. 28, 1869, found on page 42 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 32, J. G. S., ex'r," by consent.)

Int. 36. I request you to read the record of the meeting of Nov. 23, 1869, found on page 45 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 33, J. G. S., ex'r," by consent.)

229 Int. 37. I request you to read the record of the meeting of Nov. 27, 1869, found on page 53 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 34, J. G. S., ex'r," by consent.)

Int. 38. I request you to read the record of the meeting of Dec. 28, 1869, found on page 55 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked Defendants' Exhibit 35, J. G. S., ex'r," by consent.)
Int. 39. I request you to read the record of the meeting of Jan. 26, 1870, found on page 56 of said record.

Ans. I read as follows.

(What witness reads is transcribed and marked "Defendants' Exhibit 36, J. G. S., ex'r," by consent.)

Int. 40. I request you to read the record of the meeting of May 24, 1870, found on page 65 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 37, J. G. S., ex'r," by consent.)

Int. 41. I request you to read the record of the meeting of July 26, 1870, found on page 66 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 38, J. G. S., ex'r," by consent.)

Int. 42. I request you to read the record of the meeting of Oct. 25, 1870, found on page 68 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 39, J. G. S., ex'r," by consent.)

Int. 43. I request you to read the record of the meeting of Dec. 27, 1870, found on page 69 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 40, J. G. S., ex'r," by consent.)

Int. 44. I request you to read the record of the meeting of Jan. 24, 1871, found on page 71 of said record.

230 Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 41, J. G. S., ex'r," by consent.)

Int. 45. I request you to read the record of the meeting of Feb. 6, 1871, found on page 74 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 42, J. G. S., ex'r," by consent.)

Int. 46. I request you to read the record of the meeting of Feb. 20, 1871, found on page 77 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants Exhibit 43, J. G. S., ex'r," by consent.)

Int. 47. I request you to read the record of the meeting of Sept. 26, 1871, found on page 88 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 44, J. G. S., ex'r," by consent.)

Int. 48. I request you to read the record of the meeting of Nov. 28, 1871, found on page 90 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 45, J. G. S., ex'r," by consent.)

Int. 49. I request you to read the record of the meeting of Dec. 26, 1871, found on page 92 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 46, J. G. S., ex'r," by consent.)

Int. 50. I request you to read the record of the meeting of Jan. 23, 1872, found on page 93 of this record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 47, J. G. S., ex'r," by consent.)

Int. 51. I request you to read the record of the meeting of May 28, 1872, found on page 101 of said record.
Ans. I read as follows:

231 (What witness reads is transcribed and marked "Defendants' Exhibit 48, J. G. S., ex'r," by consent.

Int. 52. I request you to read the record of the meeting of July 23, 1872, found on page 107 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 49, J. G. S., ex'r," by consent.)

Int. 53. I request you to read the record of the meeting of Oct. 22, 1872, found on page 116 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 50, J. G. S., ex'r," by consent.)

Int. 54. I request you to read the record of the meeting of Nov. 26, 1872, found on page 117 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 51, J. G. S., ex'r," by consent.)

Int. 55. I request you to read the record of the meeting of Sept. 16, 1873, found on page 126 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 52, J. G. S., ex'r," by consent.)

Int. 56. I request you to read the record of the meeting of Nov. 25, 1873, found on page 129 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 53, J. G. S., ex'r," by consent.)

Int. 57. I request you to read the record of the meeting of July 28, 1874, found on page 140 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 54, J. G. S., ex'r," by consent.)

Int. 58. I request you to read the record of the meeting of Sept. 29, 1874, found on page 145 of said record.
Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 55, J. G. S., ex'r," by consent.)

232 Int. 59. I request you to read the record of the meeting of Nov. 24, 1874, found on page 149 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 56, J. G. S., ex'r," by consent.)

Int. 60. I request you to read the record of the meeting of March 23, 1875, found on page 60 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 57, J. G. S., ex'r," by consent.)

Int. 61. I request you to read the record of the meeting of July 27, 1875, found on page 178 of said record.

Ans. I read as follows:

(What witness reads is transcribed and marked "Defendants' Exhibit 58, J. G. S., ex'r," by consent.)

Int. 62. Please examine the book of records in your hands and state whether any additions have been made thereto or any writing placed in said book since the records in the book were closed.

Ans. There is some writing on the inside of the front cover and on the leaf next to it which was not there the last time I saw the book, to my recollection; otherwise I do not observe any additions. I don't think I have seen this book before to-day, to examine it, for two or three years, except when it was presented to me in taking a deposition in this case, and then I examined only the parts that were pointed out.

Int. 63. What is the date of the last meeting recorded in said book, and does that fill the whole of said book with the exception of the place for the index?

Ans. The last meeting is under date of Feb. 26, 1878, and it does so fill said book.

Int. 64. At the time of your completing said records and when they passed from your hands was the writing on the fly-leaf existing there?

Ans. It was not. I never knew of the existence of said writing until to-day.

233 Int. 65. In whose handwriting is the writing on the fly-leaf of said book?

Ans. I think it is in the handwriting of Mr. F. A. Brooks, president of the road.

Int. 66. Has he ever been clerk of the road to your knowledge, or is he now?

Ans. He has not and is not now, to my knowledge.

Int. 67. Do your records of the board of directors show any authority to make the entry on said fly-leaf; and, if so, will you point it out?

Ans. Not to my knowledge.

Int. 68. Please examine the paper marked "XXX, Sept. 2, 1885, J. G. S., ex'r," for identification, and state whether the same is a correct copy of the said writing on said fly-leaf.

Ans. It is.

Int. 69. Whether or not upon the inner page of the binding of said book there appear the words "Clerk's office of the Nashua and Lowell Railroad Corporation, Nashua, N. H.;" and, if so, in whose handwriting.

Ans. Those words do so appear, and, I think, are in the handwriting of F. A. Brooks, the president of the corporation.

Int. 70. Were those words in said book when the record was completed and left your hands?

Ans. I never saw them, to my knowledge, before to-day.

Int. 71. Now, sir, is there any signature to the writing upon the fly-leaf or any mark or sign to inform any person unacquainted with the handwriting of Mr. Brooks, the president of the corporation, that said writing which you say has been added since the record was completed was placed there by an unauthorized person?

Ans. There is not.

Int. 72. Will you please examine the book now handed you, having upon the cover thereof "Directors' Records, 1856–1878, B. & L. and N. & L. R. R'ds," and marked for identification on the inner front fly-leaf "Y, Sept. 2, 1885, J. G. S., ex'r," so far as the same purports to be a copy of the records of the board of directors of the Nashua and Lowell Railroad Corporation, by comparing the same
234 with the book of records here produced by you as the original book of records of the meetings of said directors from June 17, 1867, to Feb. 26, 1878, inclusive, and state whether or not said copy in said book is a true and accurate copy of said original records for the period named?

Ans. I will, at my convenience.

(Adjourned.)

SEPT. 3, 1885.

Int. 73. Have you now compared the book, "Directors' Records," etc., referred to in the last question, as therein requested?

Ans. I have occupied all the time I conveniently could since my last examination, and have got a little over half through, and will complete the comparison as soon as I can. They are very voluminous.

Int. 74. State whether or not said records show that at the several meetings of the boards of directors monthly statements of the earnings and expenditures of the joint roads were presented for their consideration, and whether semi-annual statements were presented for settlement at the end of each six months.

(The term "semi-annual statements were presented for settlement" objected to as assuming what does not appear, thus far, as true.)

Ans. The records show that statements of the receipts and expenditures were made at the regular monthly meetings, and that every six months, at the time of declaring dividends, statements of the receipts and expenditures for the preceding six months were made.

Int. 75. Did you see any of such statements?

Ans. I did.

Int. 76. Please look at paper shown you, marked "Defendants' Exhibit 61, J. G. S., ex'r," and state whether or not it is the form used in the said monthly statements.

Ans. It has the same general appearance, and I remember many of the items. My judgment is that the items under "apportionment" are all there.

Int. 77. Does it, according to your best recollection, contain the different items of these monthly statements—I mean the printed part of it?

Ans. It does.

235 (Defendants' Exhibit 61 is put in evidence by counsel for defendants.)

Int. 78. While you were a member of the Nashua and Lowell railroad what was the custom as to settlement of these semi-annual accounts under the contract? Was it by committee or by direct action of the board?

(Objected to as implying that the directors had anything to do with these semi-annual settlements.).

Ans. I do not recollect of any formal settlement of any semi-annual account by the board of directors.

Int. 79. Will you be kind enough to hand the examiner a statement of the dates of the several meetings of the board of directors of the Nashua and Lowell railroad, as appears by their records from 1858 to 1878, to be marked "Defendants' Exhibit 62" and put in evidence in this case?

(Objected to as immaterial.)

Ans. I will.

(Adjourned.)

SEPT. 4, 1885.

Int. 80. Have you made up the statement required in the last interrogatory? And, if so, produce the same.

Ans. I have, and now produce.

(Statement produced is put in evidence and marked "Defendants' Exhibit 62, J. G. S., ex'r.")

Int. 81. Have you made examination sufficient to answer Int. 72?

(Objected to as immaterial and incompetent.)

Ans. I have.

Int. 82. Please state whether said book marked for identification as aforesaid is a true and accurate copy of the original records so far as required by said question—I mean from June 17, 1867, to Feb. 26, 1878, inclusive.

(Objected to as above.)

Ans. It is.

Int. 83. Will you make a similar examination of the other records contained in said book, purporting to be records of the directors of

the Nashua and Lowell Railroad Corporation from Sept. 22,
236 1858, to May 28, 1867, inclusive, by comparison with the original records, marked for identification "X, Aug. 27, 1885, J. G. S. ex'r," and state whether the same is a true and accurate copy of said records?

(Same objections.)

Ans. I will.

(Right to put in above statement when made is reserved to defendants' counsel by consent.)

Cross-examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

Cross-int. 84. Referring to the memorandum entered upon the fly-leaf of records of plaintiffs' directors' meetings No. 2 (same referred to in Int. 82), covering the period from 1867 to 1878, and in these words:

"*Record.*

Proceedings of directors of the Nashua and Lowell Railroad Corporation at all meetings of said directors from June 17, 1867, to Feb. 26, 1878, inclusive, both those meetings held jointly with the directors of Boston and Lowell Railroad Corporation at Boston and those held separately during same period. The meetings held on the fourth Tuesday of every calendar month at the manager's office, in Boston, herein recorded as meetings of the directors of the Nashua and Lowell Railroad Corporation, were, in fact, joint meetings of the directors of both the Nashua and Lowell Railroad Corporation and of the Boston and Lowell Railroad Corporation, though this fact does not always appear from the record as kept by the clerk of the Nashua and Lowell railroad directors."

being the same set forth as marked for identification "XXX" in Int. 68 in chief in this deposition, state whether or not that statement is correct according to your understanding of the fact; if not, how otherwise?

(Objected to as incompetent and irrelevant, as asking the opinion of witness as to the correctness of an unauthorized addition to the records made by counsel for complainants, Mr. Brooks, and as not calling for any question of fact or any matter within the knowledge of this witness.)

Ans. As I understand the facts and as I understand this statement, it is true, although it covers the proceedings of the
237 directors for several years when I was not a member of the board, and in regard to which I have no knowledge, only as appears from the records.

Cross-int. 85. Does that statement on the fly-leaf of plaintiffs' directors' records No. 2 appear to be any addition to the records themselves or a modification thereof in any way or an attempt at any such thing; and, except for that statement and the one made

on the inside of the cover opposite the same, is there anything to show what the book is apart from the entries made in said book by the clerk of directors of plaintiff corporation?

(Same objection, and as new matter.)

Ans. In answer to first clause of question, I answer, It does not; to the second clause, I answer, There is nothing so to show.

Cross-int. 86. In your answer to Int. 52 you put in as an exhibit, No. 49, a copy of the record of meeting of the directors of plaintiff corporation held July 23, 1872. In Int. 72 you were requested to examine records produced by defendants' counsel, purporting to be the book of records of directors of both the Boston and Lowell and Nashua and Lowell railroads from 1856 to 1878 or copies thereof, being the same book referred to in your answer of [to] Int. 82 and marked "Y, J. G. S., ex'r." Please state whether the vote relating to payment of interest to defendant corporation on its Boston improvements, recorded in the plaintiffs' directors' records of the meeting of July 23, 1872, appears also in the record of the doings of the directors of defendant corporation at their meeting held at the same time and place, and whether both these votes are entered or recorded in parallel columns of that book on the same page or pages, as shown in the book marked "Y, J. G. S., ex'r."

(Objected to as incompetent and as incorrectly stating and assuming that witness was asked to compare any other writing contained in the book alluded to than what purported to be copies of the records of the Nashua and Lowell Railroad Corporation, and as incompetent and improper to attempt to put in this way records of the defendant corporation which have not been authenticated and concerning which there has been no direct examination.)

Ans. In answer to the first clause of question, It does so appear. In answer to the second clause of the question, The votes are so recorded.

238 Cross-int. 87. Were you not, in your examination-in-chief, requested by defendants' counsel to compare the original records of plaintiffs' directors with the copies of such records contained in the book marked "Y, Sept. 2, 1885, J. G. S., ex'r," and have not you done so at such request, and does not such Book Y also contain or purport to contain copies of the records of the meetings of the directors of the defendant corporation written in parallel columns and on the same pages, with copies of records of meetings of the plaintiffs' directors of same dates? Was not this Book Y written up under and by virtue of votes of the directors of one or both said corporations while the two roads were operated under the joint contract? Please look at the record of the directors of both corporations held Sept. 26, 1876, before answering this question, which said vote on the part of the Boston and Lowell directors is set forth in the testimony of Charles E. Cram in answer to Int. 13 to him, printed on page 100 of the record in this case, in the words following:

"Voted, That Messrs. Burke and Amory, the latter for the Nashua

and Lowell Railroad Company, be a committee to read over the copies from the records of votes passed by the joint boards and report, with a view to their being put in print."

(Same objections, and as new matter not inquired of in the direct.)

Ans. I was so requested and have done so. Said Book Y does not purport to contain copies of such records. My recollection is not such that I could say that Book Y was made in pursuance of such vote or votes. I have not very much of a recollection about it. My impression is that this book or a similar book was gotten up by the direction of Mr. Hosford, the manager of the joint roads.

(Answer objected to as far as it relates to any similar book.)

Cross-int. 88. Please look at record of plaintiffs' directors of meeting held Sept. 26, 1876, and state what action was taken by them on this subject at that time.

(Objected to as new matter not inquired of in the direct, and incompetent.)

Ans. I cannot state what was done by them. I misapprehended the last question. They passed the following vote: "Voted,
239 That Mr. Amory and Mr. Burke be a committee to examine copies of votes passed by the two boards of directors, with a view to their publication," as appears by the record.

(Same objection to answer.)

Cross-int. 89. Were you not present at said meeting, both as clerk and as one of plaintiffs' directors, and have you not some recollection of the action so taken, or of some action taken on the subject at some time independently of the record itself?

Ans. I was so present. I have no recollection in regard to it excepting that, upon reading the record, I have a slight recollection of such a committee being appointed.

Cross-int. 90. Do you recognize the handwriting of Book Y, containing copies or transcripts of these records in parallel columns?

Ans. I do; it is that of a Mr. Dickerman, who, I understand, is dead.

Cross-int. 91. Whether or not you ever saw a copy of these records or of any part of them in the same handwriting before the same were found in the office of the manager of the joint roads.

(Same objection, and because witness has not compared such writing with the original so that he can testify.

Plaintiffs' counsel states that as he understands the fact the witness has compared the records in Book Y, so far as they contain any action had by the plaintiffs' directors for the year 1876, with the originals, at request of defendants' counsel, as appears by the few last answers in chief of witness, or that witness has so testified.)

Ans. I saw them occasionally whilst they were being made in the manager's office, or an anteroom of the same, but I have no recollection of seeing them after they were completed and before they were used, but I might have seen them.

Cross-int. 92. Please look at book of record of plaintiffs' directors at meeting held March 23, 1875, recorded at page 160 of said book of records. State whether that was or purported to be a meeting attended by both boards of directors; also state whether at or near the bottom of page 161 of said record any action appears to have been taken upon the motion of the manager; and, if yea, what such action was, and whether the manager was not then a member of the board of directors of the defendant corporation.

(Same objections.)

Ans. From the records I should judge it was a meeting where both boards were present. A motion made by the manager seems to have been passed. The vote was to discontinue the sale of package tickets, as appears by the records. The manager was a member of the board of directors of defendant corporation.

(Each clause of answer objected to as immaterial and incompetent, and as new matter not inquired of in the direct examination.)

Cross-int. 93. Please look at the record of plaintiffs' directors meeting held April 27, 1875. State whether you were present at said meeting, and whether said meeting was a separate meeting of the plaintiffs' directors or a meeting of the joint boards, and please read from the said record the part indicated by pencil marks.

(Same objections.)

Ans. I was present at said meeting, as appears by said record, and I think from the record that it was a meeting where both boards were present. I read as follows:

"Mr. Stearns presented an application from the Central Vermont road for acceptance on account of collections on their joint business, and it was voted that the same be referred to the finance committee of the two roads."

Cross-int. 94. Please look at the record of same meeting of directors of defendant corporation as found in Book Y, before you, and state what action was taken by the defendants' board of directors on this subject according to said Book Y or the statements therein contained.

(Same objections, and, further, because it does not appear to be a true copy of defendants' record.)

Ans. The record is as follows:

"Governor Stearns, of the Nashua and Lowell Co., submitted a proposition from the Central Vermont R. R. Co. to draw on the Boston and Lowell and Nashua and Lowell R. R. Co. for $100,000 at three months in anticipation of payments not yet due. On motion of Mr. Richardson it was voted that the subject be referred to the finance committee for consideration."

(Counsel for complainants here closes his cross-examination of this witness, and says that he claims to proceed to examine

him as his own witness upon matters not embraced in his testimony-in-chief in this deposition, and so make him his own witness as to testimony hereafter given by him, and consequently subject to cross-examination by defendants' counsel as to such subsequent testimony.

Counsel for defendants objects to plaintiffs putting in any direct testimony in rebuttal at this stage of the case, especially as counsel for the plaintiffs refuses to give counsel for defendants any extension of time for taking his testimony.

The examiner rules that if the complainants' counsel has closed his cross-examination he cannot make the witness his own and examine him at this time against the objections of defendants' counsel.

Counsel for plaintiffs, in view of this ruling of the examiner, which he believes to be erroneous, will proceed to continue the cross-examination of the witness, and hopes, under these circumstances, the defendants' counsel will not claim the right to cross-examine the witness as to matters hereinafter testified to by him.)

Cross-int. 95. Please look at the entry found in the record of the meeting of the plaintiffs' directors held April 27, 1875. Does it not appear from said record that this was one of the monthly meetings of the two boards at which the directors of the defendant corporation were usually present? Do you find in said record these words:

"The president called the attention of the board to certain agreements between the two roads as to leased lines and improvements, which had not been formally reduced to writing, and stated that he held drafts for such contracts drawn by the attorney of the company, but which he had not yet been able to examine, and it was voted that the same be referred to a committee consisting of the president and Messrs. Stark and Hosford, of the Lowell board, and that they be requested to report at the next meeting."

Were you not present at said meeting, and do you not recollect the facts therein set forth in regard to the proposed drafts of the contracts named in the record? Did not such drafts of proposed contracts relate to the matters in controversy in this suit or some of them? If not, how otherwise?

(Objected to as incompetent and immaterial and as introducing new matter not inquired of on the direct, and as attempting to prove by this witness what cannot be proved in this way.)

242

Ans. In answer to first clause, it does so appear and I was so present.

(Objected to because it undertakes to give the witness's version of what was usually done.)

I find the language quoted in the question. I have a recollection in regard to the matter. They did relate to some of the matters in controversy in this suit, as I understand.

Cross-int. 96. Please examine the copy of record of meeting of the defendant corporation's directors, contained in Book Y, now before you, namely, that of April 27, 1875, and state what action appears, from said copy of defendants' records, to have been had by defendants' directors on the same subject.

(Same objections.)

Ans. The copy is as follows:

"The president submitted forms for an agreement proposed to be made between the Boston and Lowell and Nashua and Lowell Railroad Companies to cover all outstanding matters of joint interest, and it was voted that the president, Gen. Stark, and Mr. Richardson, the latter on behalf of the Nashua and Lowell Railroad Company, be a committee to have such an agreement prepared to be submitted to this board at a future meeting."

Cross-int. 97. Please look at the record of the next monthly meeting of the two boards, held May 25, 1875, and state what action was then taken on this subject.

(Same objections.)

Ans. At the meeting of the Nashua and Lowell railroad directors held May 25, 1875, the action taken was as follows, as appears by the record:

"The committee on unfinished contracts reported drafts of agreements covering such understandings as have been in force relative to new leases and expenditures by both parties since the original partnership contract of 1858. On motion of Mr. Bailey, the subject was postponed to the next meeting of the board."

Cross-int. 98. Whether or not you recollect the transaction recorded in the vote, independently of the record thereof.

(Same objections.)

243 Ans. I have a general recollection in regard to it.

Cross-int. 99. Look at the copy of the record of the proceedings of the directors of the defendant corporation at the same meeting, on the same subject contained in Book Y, now before you, and state what action appears to have been taken by the Boston and Lowell directors at the same time.

(Objected to as before, and that it is not competent for witness to testify what is admitted to be a copy which he has not compared with the original.)

Ans. It is as follows:

"The committee on unfinished contracts affecting the Boston and Lowell and Nashua and Lowell Railroad Companies reported drafts of agreements covering such understandings as have been in force relative to new leases and expenditure by both parties since the original partnership contract of 1858, and it was voted to postpone the subject to the next meeting of this board."

Cross-int. 100. Please look at the original and at the copy of record of the meeting of the two boards held July 27, 1875, and state what action was then taken on the same subject.

(Same objection.)

Ans. The record of the Nashua and Lowell board of directors is as follows:

"On motion of Mr. Lowell, voted that the subject of the drafts of agreement reported by the committee on unfinished contracts lie upon the table."

In the copy of records of meetings of the directors of defendant corporation, found in Book Y, I find the following:

"The president read a new draft of the proposed agreement between the Boston and Lowell and Nashua and Lowell railroads covering such understandings as have been in force relative to new leases and expenditures by both parties since the original partnership contract of 1858, and on motion of Mr. Lowell, of the Nashua and Lowell, it was voted that the agreement be laid on the table."

Cross-int. 101. Have you been one of the directors of the plaintiff corporation ever since July 27, 1875, and whether or not those drafts of proposed contracts were afterward agreed to or adopted at any meeting of the directors of the Nashua and Lowell Railroad Corporation.

(Same objections.)

244 Ans. I have been a director since July, 1875. The proposed contracts were not afterwards adopted.

Cross-int. 102. Whether or not the action so proposed—*i. e.*, the execution of agreements or written contracts between the two roads in relation to improvements, etc.—was opposed and objected to or assented to by the directors of the plaintiff corporation or some of them.

(Same objection.)

Ans. It never was acted upon. Some of the individual members of the board were opposed to it.

Cross-int. 103. Please look at a copy of the printed report of the directors of the Boston and Lowell Railroad Corporation for the year 1877, now handed you, and look at page 12 of the same. Whether or not you there find these words:

"The two boards of directors, with a common president, held joint meetings, and for more than seventeen years there was perfect harmony of opinion and action, although the Boston and Lowell directors always believed that the contract assigned to the Nashua and Lowell road a too liberal share of the net earnings."

After answering this question please hand the report to the examiner, to be annexed as an exhibit to this deposition, but not to be printed unless the defendants' counsel so desires.

(Same objections.)

Ans. I have examined the report, and do find the words stated. I hand the report to the examiner.

(The report is marked "Exhibit Report B. & L. (1877), J. G. S., ex'r," and it is agreed that this report need not be reprinted, but either party may refer to the same, counsel for defendants not waiving his objections thereto.)

Cross-int. 104. So long as these monthly meetings of the two boards were held, after you became a director and during the existence of the joint-traffic contract, whether or not it was the custom of the presiding officer to submit motions or propositions to both boards for their action at one and the same time, and to take the sense of the meeting upon such propositions, without calling for a separate vote thereon from each board; and whether or not it was usual for the presiding officer to call for the separate vote of
245 each board of directors on any measure unless some opposition had been manifested to such measure.

(Objected to as new matter and as attempting to prove a custom.)

Ans. Such was the custom. It was not customary for the presiding officer to call for a separate vote unless there was some opposition to the proposed action.

Cross-int. 105. You are, I believe, a member of the bar of the State of New Hampshire and counselor-at-law in the courts of that State and know the statutes or laws in force in that State. Please set forth the contents of the fifth section of the one hundred and forty-seventh chapter of the General Laws of New Hampshire, now in force, said chapter being entitled "General powers of corporations."

(Objected to as incompetent, new matter, not inquired of in the direct.)

Ans. This section reads as follows:

"Any such corporation may make contracts necessary and proper for the transaction of their authorized business and no other. They shall not become sureties nor guarantors nor be capable of binding themselves as such."

Cross-int. 106. Whether or not the same statute law has been in force in New Hampshire ever since 1867.

(Same objections.)

Ans. It has.

Cross-int. 107. Whether or not the plaintiff corporation is among the corporations embraced in the meaning of said § 5 of chap. 147 of the General Laws of New Hampshire, above cited and now in force.

(Objected to for same reasons and because it appears that this corporation was chartered by virtue of the laws of Massachusetts, and because it is not competent for the witness to pass upon the question, which is pertinent only for the consideration of the court.)

Ans. I understand that it does apply to all corporations excepting public municipal corporations and excepting those corporations whose charters are not subject to alteration, amendment, or repeal.

246 Cross-int. 108. Whether or not, according to your understanding, this statute applies to the plaintiff corporation in this case.

(Same objections.)

Ans. My impression is that it does.

Direct examination resumed:

Int. 109. Please state whether the records produced as the records of the meetings of the board of directors of the Nashua and Lowell Railroad Corporation contain, in parallel columns or otherwise, any writing purporting to be the records of any other corporation.

Ans. They do not.

Int. 110. Have you examined and produced all the books of original record of the doings of the board of directors of the Nashua and Lowell Railroad Corporation from July 18, 1856, to the present time?

Ans. I have produced the original records and have examined them for the purpose of identifying them.

Int. 111. Can you not state that said original books of record contain a record of the doings of the directors of said Nashua and Lowell Railroad Corporation alone, and do they purport to be a record of the meeting of the board of directors of any other corporation whatever?

Ans. The records referred to are the records of the doings of the board of directors of the Nashua and Lowell Railroad Corporation and of no other.

Int. 112 (*de bene*, and not waiving any objections). Your attention has been called in cross-examination to certain writing appearing in the book marked for identification "Y, Sept. 2, 1885, J. G. S., ex'r," and mentioned in said questions as a copy of the records of the Boston and Lowell Railroad Corporation. Have you ever compared said alleged copy with the original, and can you, upon your oath, testify that it is a true copy of the original?

Ans. I never have made any such comparison, and know nothing in regard to its being a true copy.

Int. 113 (*de bene*). When was it that you saw the said book
247 marked Y, or any part thereof, in the hands of the clerk of Mr. Hosford, as testified by you on cross-examination?

Ans. I have no recollection of seeing this bound book until these depositions were commenced, but I have no doubt I saw the sheets as they were being made by Mr. Dickerman, the manager's clerk. I think those copies were made some time in 1878; a portion of them might have been made in 1877.

Int. 114 (*de bene*). Then do you say that they were the records alluded to in the vote passed in 1876?

Ans. I do not say so.

Cross-examination resumed:

(Plaintiffs' counsel here states that the foregoing questions put by defendants' counsel to the witness, or some of them, would not have been free of objection if considered as put by defendants' counsel on examination by defendants' counsel of his own witness; but that he, plaintiffs' counsel, treated such questions as put by way of cross-examination of the witness as to the new matter testified to subsequent to cross-int. 95, and therefore did not object to the same. In that view he now proposes interrogatories to the witness as if in reply to such cross-examination.)

Cross-int. 115. Referring to ans. 111, whether or not the records there mentioned contain allusions to or statements in many cases of the fact that the board of directors of the Boston and Lowell Corporation were present with the directors of plaintiff corporation.

(Objected to as incompetent, as new matter not inquired of by the defendants, and furthermore because counsel for complainants does not seem to comprehend that it is competent to put a question *de bene esse* to explain testimony which may be decided to be incompetent without opening up the subject-matter to re-examination so far as new questions are concerned.)

Ans. They do.

Cross-int. 116. Do they not also contain statements in some instances of separate action taken by the Boston and Lowell directors when present at such meetings?

(Same objections.)

Ans. I think they do.

248 Cross-int. 117. Does not the book inquired about in int. 112 in this deposition contain on page 1 the following heading, page 1 being divided into equal parallel columns by a ruling through the middle of the page, but below the heading of said page, as originally printed, at the top of the page, the words "Records of directors' meetings;" then, on the left side of the sheet, the words "Boston & Lowell R. R.," and on the right side, in the same line, the words "Nashua & Lowell R. R.;" and is not this printed matter found at the top of the pages throughout the entire book?

(Same objections.)

Ans. Yes.

Cross-int. 118. Whether or not, under the heading "Boston & Lowell R. R.," in the column on the left side of the page, the word "directors" appears at the top of the column, and under it a list of the names of directors of the Boston and Lowell Corporation, on the first four leaves of said book, from 1856 to 1877, inclusive?

(Same objections.)

Ans. Such names do appear, and I understand that they were directors during the time referred to, and the columns purport to contain a list of these directors.

Cross-int. 119. In the parallel columns do you not also find the word "directors" at the top as a heading for this column, and under it a list of names purporting to be the names of directors of the Nashua and Lowell Railroad Corporation during the same period—that is, from 1856 to 1857, inclusive?

(Same objections.)

Ans. I do.

Cross-int. 120. On the next leaf following these names, whether or not there is the same heading at the top of the page extending across both columns—*i. e.*, "Records of directors' meetings," the same heading, "Boston & Lowell R. R.," at the top of the left-hand column, and "Nashua & Lowell R. R.," at the top of the right-hand column, and are not those columns of page marked 1 in pencil and all the following pages in said book filled up with what purports to be records of the meetings of the directors of each corporation, respectively, although written in the handwriting of one person?

(Same objections.)

249 Ans. Yes.

Cross-int. 121. Are not these the same pages or some of them which you saw while they were being made or copied by Mr. Dickerman, the manager's clerk?

(Same objections.)

Ans. I think they are.

Cross-int. 122. Whether or not you understand that these copies were made from the original records of the directors of each corporation by Mr. Dickerman, under the instructions of the manager, many years ago.

(Same objections, and because it is not clear that the understanding of the witness is important in this suit.)

Ans. I do so understand.

Cross-int. 123. Whether or not Mr. Dickerman, while engaged in making these copies, borrowed of you, as clerk of the directors of plaintiff corporation, your book of records for the purpose of making up the copies of the proceedings of the directors of the two corporations during the time of the joint contract and of placing them in parallel columns, as found in book marked "Y, J. G. S., ex'r."

(Same objections.)

Ans. He did, for the purpose of making copies. I suppose they are the same copies as appear on this book, though I cannot say positively that they are.

W. W. BAILEY.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of Walter A. Lovering.

Direct examination by A. A. STROUT, Esq., of counsel for defendants:

BOSTON, *Sept.* 2, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Walter A. Lovering; thirty-five; Nashua, N. H.; druggist.

Int. 2. State whether or not you are the clerk of the Nashua
250 and Lowell Railroad Corporation; and, if yea, whether you have in your possession the records of said corporation, and what period they cover.

Ans. I am clerk of the corporation, and I have the records of the corporation from July 7, 1835, to the present time.

Int. 3. Will you produce the same, in order that extracts may be made therefrom under the stipulation entered into in this cause?

Ans. I have them here and produce them.

Int. 4. State what other papers you have belonging to the corporation.

Ans. I have some papers that are copies of votes that have been acted on at stockholders' meetings, but, so far as I know, this book contains a copy of them.

Int. 5. In whose hands and custody are the treasurer's books, treasurer's accounts, contracts, vouchers, checks and receipts, statements of settlement, and papers connected with the joint management of the Nashua and Lowell Railroad Corporation and the Boston and Lowell Railroad Corporation from 1857 to December, 1878?

Ans. I haven't them in my possession. I suppose they are in the hands of the treasurer.

Cross-examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

Cross-int. 6. Were you present during the examination of W. W. Bailey this day with regard to the directors' records of plaintiff corporation in his hands from 1867 to 1878, and did you hear his testimony?

Ans. Yes.

Cross-int. 7. Have you now in your possession the same book of directors' records which he referred to and used in his testimony?

Ans. Yes.

Cross-int. 8. When was that book last in your possession before to-day?

Ans. Last Tuesday morning—yesterday.

Cross-int. 9. What did you do with it at that time?

Ans. I put it in a package and sent it to Mr. Brooks, president of the Nashua and Lowell road, by express.

251 Cross-int. 10. How long had it been in your possession previous to your sending it to me from Nashua yesterday?

Ans. I couldn't tell just how long, but several weeks, I should say.

Cross-int. 11. Please read the entry found on the fly-leaf opposite the front cover of that book that the same may be taken down by the examiner.

(Objected to as incompetent and new matter; and, further, that counsel for complainants, in his capacity as president of the corporation, cannot add to or change the character of the records of the corporation by unauthorized additions thereto.)

Ans. (Witness reads.) Record of proceedings of the directors of the Nashua and Lowell Railroad Corporation at all meetings of said directors from June 17, 1867, to Feb. 26, 1878, inclusive; both those meetings held jointly with the directors of Boston and Lowell Railroad Corporation at Boston and those held separately during the same period. The meetings held on the fourth Tuesdays of every calendar month, at the manager's office in Boston, herein recorded as meetings of the directors of the Nashua and Lowell Railroad Company, were, in fact, joint meetings of the directors of both the Nashua and Lowell Railroad Company and of the Boston and Lowell Railroad Company, though this fact does not always appear from record as kept by the clerk of Nashua and Lowell directors.

Cross-int. 12. Was not this entry on this fly-leaf when you sent the book to me by express yesterday from Nashua?

(Same objections.)

Ans. Yes, sir; it was.

Cross-int. 13. Please look at the record of the stockholders' meeting held Sept. 7, 1858, and read the part marked in pencil.

Ans. I read as follows:

NASHUA, N. H., *Sept.* 7, 1858.

Nashua and Lowell Railroad Corporation.

Agreeably to the above notice the special meeting of the Nashua and Lowell Railroad Corporation was holden at said hall, in Nashua, this twenty-second day of September, 1858.

The meeting was called to order by the president.

The notice calling the meeting having been read by the
252 clerk, the president stated at length the object of the meeting; and, on motion of Gen. Israel Hunt, of Nashua—

Voted, That the directors be authorized to conclude a contract between this corporation and the Boston and Lowell Railroad Corporation for a term not exceeding twenty years, and to embrace therein the contracts with the Salem and Lowell and Lowell and Lawrence roads.

On motion of George Stark, Esq., the meeting was then dissolved.

A true record.

Attest: GEORGE BOWERS, *Clerk.*

(Interrogatory and answer objected to by defendants' counsel as incompetent and new matter.

Plaintiffs' counsel calls attention of defendants' counsel to the stipulation respecting extracts from the corporation records referred to by him in his third interrogatory to this witness and on file in this case as authority for putting in extracts from the records of stockholders of plaintiffs' corporation instead of entire records.

Defendants' counsel says he does not object on that ground.)

Cross-int. 14. Please look at the record of the stockholders' annual meeting of May 30, 1877, and read the parts marked in pencil.

Ans. I read as follows:

NASHUA, N. H., *May* 30, 1877.

In accordance with previous notice, legally given, the stockholders of the Nashua and Lowell Railroad Corporation met at Depot Hall, in the city of Nashua, at ten o'clock in the forenoon, the president, the Hon. Daniel S. Richardson, in the chair, and called the meeting to order.

The clerk read the call for the meeting and also the record of the last annual meeting.

The president then presented the forty-second report of the directors, which, on motion of Col. George, was accepted and ordered to be placed on file.

Perley Dodge, Esq., of Amherst, introduced the following resolution, which was unanimously adopted:

Resolved, That the stockholders of the company hereby request the directors to make an early investigation of the legal relations
253 of this company with the Boston and Lowell and Peterborough Railroad Companies, and as to the rights of the company under any business contracts now in existence between it and these companies, and to ascertain whether the company has heretofore and is now receiving the full benefit of such contracts, and, if they find otherwise, to take *take* such measures as they deem expedient for realizing the benefits of said contracts, both past and present.

On motion of Col. J. H. George, the meeting then adjourned without day.

E. P. EMERSON, *Clerk.*

(Same objection to interrogatory and answer.)

Cross-int. 15. Please look at the record of the stockholders' annual meeting of May 29, 1878, and read the parts marked in pencil.

Ans. I read as follows:

NASHUA, *May* 29, 1878.

In accordance with the foregoing notice, legally given, the stockholders of the Nashua and Lowell Railroad Corporation met at Depot Hall, in the city of Nashua, at ten o'clock in the forenoon. The president, Col. William A. Tower, in the chair, and called the meeting to order. The clerk read the call for the meeting and also the record of the last annual meeting, which was approved.

The president then presented the report of the directors, it being

the forty-third; which, on motion of Col. H. M. Goodrich, was accepted and ordered to be placed on file.

Mr. O. C. Moore introduced the following resolution, which was adopted:

Resolved, That the stockholders of this company have learned with surprise, from the report of the directors this day presented, the fact of the vote passed at the directors' meeting holden July 23, 1872, and the result of that vote thus far in depriving this company of more than $150,000 and in bestowing the same upon the Boston and Lowell Railroad Company.

Therefore resolved, That, in our judgment, this vote was passed in the interest of the Boston and Lowell Railroad Company and in entire disregard of the rights and interests of this company and of the terms and provisions of the joint-traffic contract itself.

254 Resolved, That the directors this day elected are requested to take proper measures for restoring to the treasury of this company the sums so diverted from it by the Boston and Lowell Railroad Company.

On motion of Mr. J. W. White, the meeting was then dissolved.

E. P. EMERSON, *Clerk.*

(Same objections to interrogatory and answer.)

Cross-int. 16. Please produce the forty-third report of the directors, referred to in the answer to the last question, and state whether the same is a part of the files of the Nashua and Lowell Railroad Corporation, and is the same referred to in the record of the annual meeting of May 29, 1878, as presented by the president to that meeting and accepted and ordered to be placed on file.

Ans. I produce the report called for, and it is the same.

(Same objections to interrogatory and answer.)

Cross-int. 17. Will you leave this report with the examiner, to be made use of as a part of your answer to the last question?

(Objected to as incompetent, as new matter not inquired of in the direct.)

Ans. Yes, sir.

(Report produced as marked "Complainants' Exhibit Lovering, 43d Annual Report of Plaintiffs' Directors, J. G. S., ex'r.")

Direct examination resumed:

(Interrogatories *de bene*, not waiving former objections.)

Int. 18. From whom did you receive the book of directors' records, to which you refer in cross-int. 7 *et seq.*, before you sent it back to Mr. Brooks yesterday, as stated?

Ans. It was sent me by Mr. Brooks by express.

Int. 19. Had you ever had it in your possession before, to your knowledge?

Ans. No, sir.

Int. 20. When was it that he sent it to you by express? State as nearly as you can.

Ans. It was some few weeks ago. I was out of town when the book arrived, and my wife didn't give it to me till some
255 few days after it was received, and I couldn't tell you the day or the month it was received. I should say it was from six to ten weeks ago.

Int. 21. Was the writing to which you have testified in it then?

Ans. It was, and I think the only writing I saw was on those two pages.

Int. 22. Do you know the handwriting of Mr. Francis A. Brooks?

Ans. Yes, sir.

Int. 23. Is not the entry which you have read in his handwriting?

Ans. It looks like it.

Int. 24. Did you get any letter from him when he sent you the book?

Ans. Yes, sir; I did.

Int. 25. Where is it?

Ans. I don't know; probably thrown in the waste basket.

Int. 26. Did he allude to this entry?

Ans. No, sir.

Int. 27. What did he tell you to do with the book?

Ans. The contents of his letter were that he thought the custody of the book properly belonged to me, and to put it with the other records for safe keeping.

Int. 28. Have you changed it since?

Ans. No, sir.

Int. 29. Have you any doubt that that entry was made by Mr. Brooks in the front part of that book, with reference to the case now pending? Will you please answer yes or no?

Ans. Yes; I may have doubts; I am not certain of it.

Int. 30. Is that the fact, in your opinion?

(Objected to as calling for the opinion of the witness in a matter as to which it does not appear that he has any knowledge or information, and as to which, in the absence of such information or knowledge, he has no right to any opinion whatever; also because the question asks whether the supposition of defendants' counsel is a fact—that is, if the witness agrees with the defendants' counsel in supposing that plaintiffs' counsel had a particular purpose in making the entry referred to.)

Ans. I am not very familiar with Mr. Brooks's hand-
256–276 writing, and I don't know as I could say he wrote that; I can simply say it looks like his handwriting.

Int. 31. Assuming that it is his handwriting, in your opinion was it not placed there by him with reference to the case now pending, in which you are giving your deposition?

(Objected to as above.)

Ans. I should think likely it was.

Cross-examination resumed:

Cross-int. 32. Will you please state if I am right in supposing that by your last answer you meant to say that you should think the handwriting of the entry referred to was mine, and meant nothing more by said answer?

Ans. No, sir; I didn't mean that. I intended to convey the meaning that it had reference more particularly to the object in placing it there.

Cross-int. 33. Just before giving your thirty-first answer did not defendants' counsel place this book in your hands to examine again the handwriting of the entry on the fly-leaf, and was not your answer made immediately after such examination of the handwriting?

Ans. Yes, sir.

WALTER A. LOVERING.

Attest: JOHN G. STETSON, *Examiner.*

* * * * * * *

277 BOSTON, *Sept.* 3, 1885.

Counsel for defendants puts in the following:

Laws of 1836, chapter 249, of the acts of the Legislature of Massachusetts, the same being "An act to establish the Nashua and Lowell Railroad Corporation," and the same is marked "Defendants' Exhibit 59, J. G. S., ex'r."

Laws of 1838, chapter 96, of the acts of the Legislature of Massachusetts, the same being "An act to unite the Nashua and Lowell Railroad Corporations of Massachusetts and New Hampshire," and the same is marked "Defendants' Exhibit 60, J. G. S., ex'r."

It is agreed that the above exhibits need not be printed, but may be referred to by either party, and the same agreement is made as to the acts of the Legislature of New Hampshire, put in by complainants.

It is admitted that the boards of directors of each corporation, plaintiff and defendant, were duly and lawfully elected.

The following stipulation is filed with the examiner:

Stipulation.

It is agreed as follows in this cause:

The plaintiff corporation shall produce and submit to A. A. Strout, Esq., of counsel for defendants, all records of stockholders'
278 meetings of plaintiff corporation desired by him, from which he may make such extracts or copies as he may elect to offer as evidence in this case; and the extracts or copies so made by him may be used in evidence just as far as the originals could be so used if offered in evidence by him, subject to all lawful objection thereto; and the plaintiff corporation may make extracts or copies from said records, whenever the originals will be competent, and offer the same

as evidence, subject to all legal objections thereto which could be made to the original, formal objections being waived by both parties.

F. A. BROOKS,
For Plaintiffs.
A. A. STROUT,
For Defendants.

(Adjourned.)

BOSTON, *Sept.* 4, 1885.

Defendants' counsel puts in evidence notice served upon counsel for plaintiff corporation, and the same is marked "Defendants' Exhibit 64, J. G. S., ex'r." It is admitted that said notice of which Exhibit 64 is a duplicate was given in hand to the plaintiffs' counsel, F. A. Brooks, Esq., this day, Sept. 4, 1885, at 11 a. m.

Counsel for defendants puts in evidence the extracts from the records of the stockholders of the Nashua and Lowell Railroad Corporation, identified in the testimony of Walter A. Lovering as the records of the said stockholders, under the stipulation between plaintiffs' and defendants' counsel in relation to the same in this record, parts not copied being omitted by consent; and the said extracts are marked—

"Defendants' Exhibit 65, J. G. S., ex'r."
" " 66, " "
" " 67, " "
" " 68, " "

(Adjourned.)

BOSTON, *Sept.* 8, 1885.

Counsel for defendants offers in evidence, under the stipulation heretofore filed, extracts from records of the Nashua and Lowell Railroad Corporation, and the same are marked "Defendants' Exhibit 69, J. G. S., ex'r."

Counsel for defendants also puts in evidence the paper heretofore marked "X X, Aug. 28, 1885, J. G. S., ex'r," and the same is now marked "Defendants' Exhibit 70, J. G. S., ex'r."

279 Counsel for defendants also puts in evidence the paper heretofore marked "X X X, Sept. 2, 1885, J. G. S., ex'r," and the same is now marked "Defendants' Exhibit 71, J. G. S., ex'r."

Complainants' counsel admits that he has been notified by defendants' counsel of the intention of defendants to take the evidence of Walter A. Lovering, Charles B. Brooks, and Cornelius V. Dearborn, at Nashua, to-morrow, Sept. 9, 1885 at 11 a. m., and will make no objections as to the sufficiency of said notice.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of William W. Bailey (Recalled).

Direct examination by A. A. STROUT, Esq., of counsel for defendants.

BOSTON, *Sept.* 11, 1885.

Int. 124. Have you now completed the examination and comparison requested of you in Int. 83 of your examination, page 235 of the printed record, and is said book marked "Y, Sept. 2, 1885, J. G. S., ex'r," a true and accurate copy of the records of the directors of the Nashua and Lowell Railroad Corporation from Sept. 22, 1858, to May 28, 1867, inclusive, so far as it purports to be such copy?

Ans. I have completed the comparison, and find it to be a true and accurate copy of said records, so far as it purports to be.

(No cross-examination.)

W. W. BAILEY.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of Charles E. A. Bartlett.

Direct examination by A. A. STROUT, Esq., of counsel for defendants:

BOSTON, *Sept.* 11, 1885.

Int. 1. Please state your name, and if you have heretofore testified in this cause in behalf of complainants.

Ans. Charles E. A. Bartlett; I have.

280 Int. 2. Whether or not you recollect the time of making the contract between the Boston and Lowell and Nashua and Lowell Railroad Corporations, Exhibit A, on page 12 of this record, and whether or not the roads were jointly operated under said contract.

Ans. I know nothing about the making of the contract. The roads were operated under this contract.

Int. 3. What connection, if any, did you have with the two roads during the continuance of this contract, from 1857 to Dec. 1, 1878?

Ans. In various capacities until 1866, from which time I acted as cashier.

Int. 4. By whom were you appointed cashier and what were your duties as such cashier?

(Objected to because the appointment to and duties of such office must have been made and fixed by virtue of some writing and should be proved by such writing.)

Ans. By the manager, confirmed by votes of directors of the Boston and Lowell railroad and the Nashua and Lowell railroad. My duties were to receive and disburse the cash receipts of the joint roads or received under the joint contract.

Int. 5. Did you so continue to act as long as the joint operation of the two roads continued?

Ans. I did.

Int. 6. State whether or not there was an acting chief clerk from 1866 to 1879, and, if yea, by whom he was appointed, and what his duties were.

(Objected to, that the duties of the chief clerk were defined by the rules adopted for the management of the roads under the joint contract, and that these duties are only provable by said rules.)

Ans. There was. I suppose he was appointed by the manager. His duty was to keep the accounts.

Int. 7. Who so acted as chief clerk from 1871 to 1879?

Ans. Theodore H. Wood, Myron Taylor, and possibly a short time William P. Ainsworth.

Int. 8. For what corporations, if any, did said chief clerks act during the time inquired of?

281 Ans. The Boston and Lowell Railroad Corporation and the Nashua and Lowell Railroad Corporation.

Int. 9. For what corporations did you act in your capacity of cashier during the same period?

Ans. The same.

Int. 10. Where did you have your office and do your business from 1871 to 1879, and was the chief clerk in the same building with you?

Ans. At the Boston and Lowell railroad station in Boston. The chief clerk was in the same building a portion of the time.

Int. 11. State the method of doing the business of the two roads from 1871 to 1879, so far as receiving and disbursing moneys were concerned and the rendering and settlement of accounts connected therewith.

Ans. The entire receipts of the two roads were received by me. Payments were made by me under direction of the manager. The accounts were made up and kept in the chief clerk's office.

Int. 12. What books of account were kept by the joint corporations, or by yourself as cashier of the joint corporations, from 1871 to 1879?

Ans. A ledger, journal, cash book, and division book, and numerous minor books which are of no importance.

Int. 13. Please read art. 14 of the contract, page 17 of the printed record, and state whether or not the monthly income and expense account of the joint roads mentioned in said article and the semi-annual statements of account on the first days of May and October therein mentioned were in fact made and rendered during the period named, from 1871 to 1878, inclusive.

Ans. The semi-annual statements were made to the Boston and Lowell Railroad Corporation, and I believe approximate monthly estimates were made to the manager during this time.

Int. 14. What was done with said statements and under them—that is, how were they adjusted? Please explain.

Ans. The statements are now in my possession as treasurer of the

Boston and Lowell Railroad Corporation. The balance due each corporation through those statements was settled by a draft of the manager on the cashier. The drafts were in favor of each of
282 the respective corporations—sixty-nine per cent. in favor of the Boston and Lowell and thirty-one per cent. in favor of the Nashua and Lowell.

Int. 15. Whose duty was it to send similar semi-annual statements to the directors of the Nashua and Lowell Railroad Corporation under the joint contract?

(Objected to as assuming it to have been the duty of any one under the contract to send such semi-annual statements.)

Ans. I suppose the chief clerk's.

Int. 16. Do you produce the journal of the Boston and Lowell Railroad Corporation for the year 1872, and is it a book of original entries?

Ans. I do; it is.

Int. 17. Please turn to page 55 of said journal and read the first entry upon the page.

(Objected to as incompetent, and, subject to such objection, complainants' counsel consents that the witness may read the entry, which, being taken down by the examiner, shall have the same effect as if the original entry were offered in evidence.)

Ans. I read as follows:

"Nashua & Lowell R. R. Dr. to interest account.

For their proportion of interest paid to April 1, 1872, on amount invested in improvements in Boston, Winchester & Mystic River R. R. ..... $6,002 66"

Int. 18. State whether or not that charge was allowed and paid by the Nashua and Lowell Railroad Corporation.

(Objected to.)

Ans. It was.

Int. 19. State whether or not you have seen the original books of account, or any of them, of the Nashua and Lowell Railroad Corporation covering the accounts of that road for 1873; and, if so, state what book you have seen and what it contained, if anything, in relation to this charge and its payment.

(Objected to.)

Ans. I have seen the cash book. Upon it appeared a pay-
283 ment to the Boston and Lowell railroad, I think, in June, 1873, of $6,002.66.

Int. 20. Whether or not the charge testified to by you as appearing on the journal of the Boston and Lowell Railroad Corporation, of $6,002.66, was presented as a bill to the Nashua and Lowell Railroad Corporation, and whether or not the payment to which you

have testified as appearing on the cash book of the Nashua and Lowell railroad was the payment of that charge?

(Objected to.)

Ans. I answer it was to both branches of the question.

Int. 21. Did you examine the journal or ledger of the Nashua and Lowell railroad to see if said item appeared in detail therein?

(Objected to.)

Ans. It did appear on the ledger as a round sum. The custom of the Nashua and Lowell road was to post directly from cash book to ledger, and said item did not appear in the journal.

Int. 22. Explain why this item of $6,002.66 appeared in this entry as a direct charge to the Nashua and Lowell Railroad Corporation, and not as a charge to the joint roads at this time, and in this connection state whether or not, as a matter of fact, said item of expenditure accrued prior to the passage of the vote of July 23, 1872.

(Objected to as not calling for a matter of fact, but for a reason why this entry was not made in a different form, and because if the entry itself, in the books of the defendant corporation, of a charge to the plaintiff corporation, which the witness says has been long since paid, were competent at all, which is denied, it is not competent for the witness to testify to any state of facts different from that which the entry itself purports to show with regard to said entry.)

Ans. Because the vote of July 23, 1872, directed the settlement so to be made. This item of expenditure did accrue prior to July 23, 1872.

Int. 23. The vote of the directors of the Nashua and Lowell Railroad Corporation of July 23, 1872, a copy of which is set forth in plaintiffs' bill, directed the cashier of the two corporations and the treasurer of the Boston and Lowell Railroad Corporation to make up an interest account on the expenditures of the Boston and
284 Lowell road for land and buildings in Boston for a new station, for the building and completing of the Mystic River railroad, and for improvements in Winchester for a new station and land for railway purposes, at the rate of seven per cent. to April 1, 1872, and directed the cashier of the two corporations to pay the same out of the joint receipts of the two corporations. Was such an account made up by you as cashier? If so, what was the amount of it? Was it paid; and what entries, if any, with reference to it have you seen on the books of the Nashua and Lowell Railroad Corporation?

Ans. Such an account was made up by me as treasurer of the Boston and Lowell railroad. The amount was $6,002.66; it was paid. I have seen an entry of the payment of said amount on the cash book of the Nashua and Lowell Railroad Corporation.

Int. 24. Is that entry the one you have mentioned in answer to Int. 19, as made in June, 1873?

Ans. It is. The gross amount was a sum of which $6,002.66 was thirty-one per cent.

Int. 25. Did you, as treasurer of the Boston and Lowell railroad, receive the gross amount, of which you say $6,002.66 was thirty-one per cent., from the joint receipts of the two roads, or did you receive directly from the Nashua and Lowell railroad its thirty-one per cent. of this gross amount; and, if the latter, was the payment made direct by the desire of the Nashua and Lowell railroad or otherwise?

(Objected to as leading.)

Explain how this payment was made fully.

(Objected to.)

Ans. Nothing was received from the Boston and Lowell and Nashua and Lowell railroads jointly. The thirty-one per cent., or $6,002.66, was received from the Nashua and Lowell railroad. The payment was made directly by the Nashua and Lowell railroad to the Boston and Lowell railroad, I think, as a matter of convenience to both parties.

Int. 26. When was that payment made?

Ans. June 18, 1873.

Int. 27. Who was then treasurer of the Nashua and Lowell road? Was this payment made by him; and, if so, in what manner?

285 Ans. Theodore H. Wood. My recollection of it is that the payment was made by him by check of the Nashua and Lowell Railroad Corporation. I mean by this the check of Mr. Wood, as treasurer.

Int. 28. Please produce the journal containing the original entry of accounts of the joint operation of the Boston and Lowell and Nashua and Lowell railroads.

(Objected to because the witness has already testified that the books of account of the two roads under the joint-traffic contract were kept by a chief clerk, and that Myron Taylor was such chief clerk, and it does not appear that the witness ever was such chief clerk or ever kept the books described in the interrogatory, and because the said Taylor is now in this building and has been in this room on this morning, and can be produced as a witness by defendants at any moment they may choose to do so, and is the only competent witness as to the accounts of the joint roads.)

Ans. I produce the journals of the Boston and Lowell Railroad Corporation.

Int. 29. State whether or not said journals produced by you contain the original entries of charges against the Boston and Lowell and Nashua and Lowell Railroad Corporations from April 1, 1872, to the end of the time during which the roads were operated jointly.

Ans. They do.

Int. 30. Please read from said books last produced the entries under the following dates: Nov. 7, 1872, April 30, 1873, Oct. 25, 1873, April 22, 1874, Oct. 26, 1874, April 1, 1875, Oct. 1, 1875,

April 1, 1876, Oct. 20, 1876, April 1, 1877, Oct. 20, 1877, April 1, 1878, Oct. 25, 1878, and Dec. 1, 1878, indicated by pencil marks thereon.

(Objected to, that the books of account of the defendant corporation are not competent as evidence in this case nor material to any issues therein, and, subject to this objection, the portions to be read by the witness from said books may be used instead of the originals without any objection in this respect.)

Ans. I read as follows:

286 *Nov. 7th*, 1872.

Journal page.

52 Geo. Stark, manager, Dr., to sundries.

Salem & Lowell R. R.:		
To rent of road six mos. to Oct. 1st		$8,750 00
Lowell & Lawrence R. R.:		
To rent of road six mos. to Oct. 1st		10,890 00
Interest account.		
To amount of interest paid & accrued to Oct. 1st, 1872, on $344,698, invested in L. & Law'ce & Salem & Lowell R. R. stock	$12,064 43	
Less L. & Law'ce R. R. dividend	4,971 00	
		7,093 43
To amount of interest to Oct. 1st on $303,642.44, invested in Lex. & A. & Stoneham Branch R. R's		9,569 51
Do. do. do. on $20,000, invested in improvements at Winchester		700 00
Do. do. do. on $656.621.09, invested in improvements at Boston		20,013 27
Do. do. do. on $112,431.18, invested in Mystic River R. R.		3,623 65
		$60,639 86

April 30, 1873.

Journal page.

61 Geo. Stark, manager, Dr., to sundries.

Salem & Lowell R. R.:	
For rent of road six mos. to Apr. 1st	$8,750 00
Lowell & Lawrence R. R.:	
For rent of road six mos. to Apr. 1st	10,890 00

Rent account.

	For rent of cattle sta. one year to Apr. 1st --		116 29
	" " and St. house " " --		1,000 00
	" " land at Wil. Junc. " --		20 00

Interest account.

	To interest paid & accrued to April 1st, 1873, on $345,674, invested in L. & L. & S. & L. R. R's stock ----------	$12,098 59	
	Less dividends on above stock --	6,623 00	
			5,475 59
287	Do. do. do. on $333,916.24, invested in Stoneham & Lex. & A. Branch R. R's----------		$11,067 97
	Do. do. do. on $20,000, invested at Winchester----------		700 00
	Do. do. do. on $120,770.99 in Mystic Riv. R. R. ----------		4,705 75
	Do. do. do. on $832,147.04, invested in Boston improvements ----------		26,093 29
			$68,818 89

October 25th, 1873.

Journal page.

70	Geo. Stark, manager, Dr., to sundries.		
	Salem & Lowell R. R.:		
	For rent of road six mos. to Oct 1st----------		$8,750 00
	Lowell & Lawrence R. R.:		
	For rent of road six mos. to Oct. 1st----------		10,890 00

Interest account.

	To interest paid and accrued to Oct. 1st on $345,674.00, invested in Low. & Law'ce & S. & Lowell R. R's stock----------	$12,098 00	
	Less dividend on L. & L. R. R.--	4,995 00	
			7,103 59
	Do. do. do. on $346,733.10, invested in Stoneham & Lex. & Arlington Branch R. R's----------		11,856 59
	Do. do. do. on $20,000, invested in Winchester----------		700 00
	Do. do. do. on $151,903.11, invested in Mystic Riv. R. R. ----------		5,173 37
	Do. do. do. on $949,066.31, invested in improvements in Boston-------		31,175 37
			$75,648 92

April 22d, 1874.

Journal page.

15 Geo. Stark, manager, Dr., to sundries.

Salem & Lowell R. R.:	
To six mos.' rent of road to April 1st	$8,750 00
Lowell & Lawrence R. R.:	
To six mos.' rent of road to April 1st	10,890 00

288 Rent account.

To rent of cattle station, 1 year, to Apr. 1st	$116 29
" " " and St. houses " " "	1,000 00
" " " land at Wil. Junc. " " "	20 00

Interest account.

To interest paid & accrued to April 1st, 1874, on $345,674, invested in Lowell & Lawrence & Salem & Lowell R. R's stock	$12.098 59	
Less dividends rec'd on above	6,623 00	
		5,475 59
Do. do. do. on $355.095.45, invested in Stoneham & Lex. & Arlington Branch R. R's		12,281 98
Do. do. do. on $20,000, invested in Winchester		700 00
Do. do. do. on $158,262.81, invested in Mystic River R. R.		5,445 62
Do. do. do on $1,075,661.75, invested in improvements in Boston		35,318 56
		$79,998 04

October 26th, 1874.

Journal page.

31 Geo. Stark, manager, Dr., to sundries.

Salem & Lowell R. R.:	
For six mos.' rent of road	$8,750 00
Lowell & Lawrence R. R.:	
For six mos.' rent of road	10,890 00

Interest account.

To interest paid and accrued to Oct. 1, 1874, on $1,199,525, invested in imp's in Boston	41,277 63
Do. on $20,000, invested in imp's at Winchester	700 00
Do. on $209,396.46, invested in Mystic Riv. R. R.	6,155 05
Do. on $318,245.45, invested in Lex. & Arlington R. R.	11,342 46

Do. on $50,000, invested in Stoneham Branch R. R.		1,750 00
Do. on $345,674, invested in Low. & Law. R. R. and Salem & Lowell R. R. stock	$12,098 59	
Less div. L. & L. R. R.	4,995	
		7,103 59
		$87,968 73

289 *April 1st*, 1875.

Journal page.

46 Geo. Stark, manager, Dr., to sundries.

47 Salem & Lowell R. R.:		
For six months' rent of road to date		$8,750 00
Lowell & Lawrence R. R.:		
For six months' rent of road to date		10,890 00
Rent account.		
For rent of cattle sta. one year to date		116 29
" " " and St. houses		1,000 00
" " " land at Wil. Junction		20 90
Interest account.		
For interest paid and accrued for six mons. to date on sundry investments, as follows:		
$1,200,854.37 invested in imp's in Boston		$42,009 28
20,000.00 " " Winchester		700 00
246,481.80 " Mystic Riv. R. R.		8,110 15
318,719.20 " Lex. & A. R. R.		11,155 17
50,000.00 " Stoneham R. R.		1,750 00
44,156.34 " Law. Branch R. R.		988 47
345,684.00 " L. & L. & S. & L. R. R's,	$12,098 59	
Less dividends	6,623 00	
		$5,475 59
		$90,964 95

October 1st, 1875.

Journal page.

64 Boston & Lowell & Nashua R. R's, Dr., to sundries.

Salem & Lowell R. R.:		
For six mos.' rent of road to Oct. 1st		$8,750 00
Lowell & Lawrence R. R.:		
For six mos.' rent of road to Oct. 1st		10,890 00

Interest account.

	For six mos.' interest paid & accrued to Oct. 1st, 1875, on sundry investments, as follows:		
	$1,200,854.33 in imp's in Boston		42,029 90
	20,000.00 " " " Winchester		700 00
	229,881.91 " Mystic Riv. R. R		7,223 60
	318,719.20 " Lex. & Arlington R. R.		11,155 17
	50,000.00 " Stoneham Branch R. R.		1,750 00
	44,296.46 " Lawrence " "		1,550 87
290	345,674.00 " stock in S. & Low. & L. & Law'ce R. R's	$12,098 59	
	Less dividend on L. & L. R. R. stock	4,995 00	
			7,103 59
			$91,152 63

April 1st, 1876.

Journal page.

76 Boston & Lowell & Nashua R. R's, Dr., to sundries.

77 Salem & Lowell R. R.:

For six months' rent of road to Feb'y 15th, 1876	$8,750 00
Lowell & Lawrence R. R.:	
For six months' rent of road to April 1st, 1876	10,890 00

Rent account.

For rent of cattle station, one year to date	116 29
" " " and St. houses, one year to date	1,000 00
For rent of land at Wil. Junc., one year to date	20 00

Interest account.

	For interest paid and accrued for six months, to April 1st, on sundry investments, as follows:		
	$1,200,854.37 invested in Boston imp's		42,029 90
	20,000.00 " Winchester		700 00
	229,881.91 " Mystic Riv. R. R.		7,223 60
	318,719.20 " Lex. & Arlington R. R.		11,155 17
	50,000.00 " Stoneham R. R.		1,750 00
	44,336.46 " Law'ce Branch R. R.		1,551 77
	545,674.00 " Salem & Low. & Low. & Law. R. R. & stock	$12,098 59	
	Less dividends rec'd	7,030 75	
			5,067 84
			$90,254 57

October 20th, 1876.

Journal page.

89 Boston & Lowell & Nashua R. R's, Dr., to sundries.

Salem & Lowell R. R.:
For six mos.' rent of road to Aug. 15, 1876-- $8,750 00

291 Lowell & Lawrence R. R.:
For six mos.' rent of road to Oct. 1, 1876---- $10,890 00

Interest account.

For interest paid and accrued for six months, to Oct. 1st, 1876, on sundry investments, as follows:

$1,200,854.37	invested	in	Boston imp's----	42,029 90
20,000.00	"		Winchester imp's--	700 00
229,881.91	"		Mystic Riv. R. R.--	8,045 86
318,719.20	"		Lex. & Arlington R. R.----	11,155 17
50,000.00	"		Stoneham R. R.---	1,750 00
345,674.00	"		L. & Law. & Salem & Low. R. R. stock----	$12,098 59
			Less dividends ----	5,809 00
				6,289 59
46,636.46	invested	in	Law. Branch R. R.	1,632 27
				$91,242 79

April 1st, 1877.

Journal page.

104 Boston & Lowell & Nashua R. R's, Dr., to sundries.

105 Salem & Lowell R. R.:
For six months' rent of road---- $8,750 00

Rent account.

Lowell & Lawrence R. R.:

For six months' rent of road----			10,890 00
" one year's rent of cattle sta.----			116 29
" " "	Andover St. houses--		1,000 00
" " "	land at Wil. Junc.---		20 00

Profit and loss.

For interest paid and accrued for six months ending March 31 on investments, as follows:

$1,200,013.26	invested	in	Boston imp's----	$42,000 46
20,000.00	"		Winchester imp's--	700 00
229,881.91	"		Mystic Riv. R. R.--	8,045 86
318,719.20	"		Lex. & Arl. " --	11,155 17
50,000.00	"		Stoneham Br." --	1,750 00
46,861.46	"		Lawr. " " --	1,640 15
345,674.00	"		L. & L. & S. & L. R. R. $12,098 59	

	Less dividend S. & L. R. R.	$1,221		
292	Less dividend L. & L. R. R.	4,995		
			6,216	
			5,882 59	
				$91,950 52

October 20th, 1887.

Journal page.

122 Boston & Lowell & Nashua R. R's, Dr., to sundries.

Salem & Lowell R. R.:		
For six months' rent of road		$8,750 00
Lowell & Lawrence R. R.:		
For six months' rent of road		10,890 00

Interest account.

For interest paid and accrued for 6 mos. ending Sept. 30th, 1877, on investments, as follows:				
$1,200,013.26	invested	in	Boston imp's	42,000 46
20,000.00	"		Winchester imp's.	700 00
229,880.91	"		Mystic River R. R.	8,045 86
318,719.20	"		Lex. & Arlington R. R.	11,155 17
50,000.00	"		Stoneham R. R.	1,750 00
46,861.46	"		Lawrence Branch.	1,640 15
345,674.00	"		Low. & Law. & Salem & Low. R. R's stock	$12,098 59
Less dividends				5,809 00
				6,289 59
				$91,221 23

April 1st, 1878.

Journal page.

138 Boston & Lowell & Nashua R. R's, Dr., to sundries.

Salem & Lowell R. R.:	
For six mos.' rent of road	$8,750 00
Lowell & Lawrence R. R.:	
For six mos.' rent of road	10,890 00

Rent account.

To rent of cattle sta., one year to date	116 29
" Andover St. houses, one year to date	1,000 00
To rent of land at Wil. Jun., one year to date.	20 00

293 Profit & loss.

To interest paid and accrued for 6 mos. ending March 31st, on investments, as follows:

$1,200,013.26	invested	in	Boston imp's	$42,000 46
20,000.00	"		Winchester imp's	700 00
229,881.91	"		Mystic River R. R.	8,045 86
318,719.20	"		Lex. & Arlington R. R.	11,155 17
50,000.00	"		Stoneham Branch R. R.	1,750 00
46,861.46	"		Law. Branch R. R.	1,640 15
345,674.00	"		Low. & Law. & Salem & Low. R. R. stock	$12,098.59
Less dividends				6,216.00
				5,882 59
				$91,950 62

October 25th, 1878.

Journal page.

156 Boston & Lowell & Nashua R. R., Dr., to sundries.

Salem & Lowell R. R.:
To rent of road, Feb'ry 15th to Oct. 1st $10,937 50
Lowell & Lawrence R. R.:
To rent of road six mos. to Oct. 1st 10,890 00

Interest account.

To interest paid & accrued for six mos. ending Sept. 30th, on investments, as follows:

$1,200,013.26	invested	in	Boston imp's	$42,000 46
20,000.00	"		Winchester imp's	700 00
229,881.91	"		Mystic Riv. R. R.	8,045 86
318,719.20	"		Lex. & Arlington R. R.	11,155 17
50,000.00	"		Stoneham Branch	1,750 00
46,861.46	"		Lawrence "	1,640 15
345,674.00	"		Low. & Law. & Salem & Low. R. R. stock	$12,098 59
Less dividends				5,809 00
				6,289 59
				$93,408 73

294 *December 1st*, 1878.

Journal page.

167 Boston & Lowell & Nashua R. R., Dr., to sundries.

Salem & Lowell R. R.:
To rent of road two mos. to date $2,916 67
Lowell & Lawrence R. R.:
To rent of road two mos. to date 4,630 20

Interest account.

To interest paid & accrued on investments, as follows, for two mos. to date:

$1,200,013.26	invested in	Boston imp's	$14,000 15
20,000.00	"	Winchester imp's	233 33
229,881.91	"	Mystic Riv. R. R.	2,681 96
318,719.20	"	Lex. & Arlington R. R.	3,718 39
50,000.00	"	Stoneham Branch	583 33
46,861.46	"	Lawrence "	546 72
345,674.00	"	S. & L. & L. & L. stock	4,032 87
			$33,343 42

Int. 31. I observe that this account in some instances appears to be with George Stark, manager, and in some instances with Boston and Lowell and Nashua and Lowell railroads. Explain the facts in connection with this.

Ans. I think some time after the commencement of the contract the charges were made as against the manager of the joint roads instead of against the joint roads; after that the charges were made against the joint roads as one and the same thing; simply the manager was charged as a matter of conciseness. The charges on the books, whether to the manager or to the joint roads, are one and the same.

Int. 32. Have you any doubt that an account of these transactions is entered on the books of the Nashua and Lowell Corporation, if not in the same form above set out, containing the substance thereof, in debit or credit entries?

(Understanding by "account of these transactions" that the question refers to such transactions as are entered on the journals of the defendant corporation produced here by the witness as treas-
295 urer of such corporation, the plaintiffs object to the question, as it would be entirely immaterial in this case if it were possible that the two contracting corporations should have books of account kept by their respective treasurers with the same entries therein.

Counsel for defendants here calls for the production of the books of account of the Nashua and Lowell Railroad Corporation containing the entries of these transactions, as per notice heretofore given.

Counsel for plaintiffs cannot believe the defendants' counsel to be of opinion that the books of plaintiff corporation contain an account of the same transactions which are entered or set forth in the books of the defendant corporation, produced and referred to by the witness in his recent answers; and plaintiffs' counsel further says that he is informed and believes that books of account were kept during the time of the joint-traffic contract by the manager or a person called chief clerk appointed by such manager, and that those books contain the accounts of the two roads during the whole period

of the joint-traffic contract, and are the only books that do contain such accounts; and plaintiffs' counsel understands and believes that those accounts, so kept by the chief clerk during the time referred to in the deposition of this witness, are now in the possession or control of the defendant corporation, and probably of this witness as its treasurer, and can be produced by defendant corporation if it so desires; and plaintiffs' counsel says that he will not object to the production of such books of account kept by the chief clerk and the use of such books, as defendants' counsel may desire.

He further says that all the entries in the books of account of the plaintiff corporation relating to business done under the joint-traffic contract are taken from these books of account, so kept by the chief clerk, and that so far as the books of account so produced by this witness as the books of the defendant corporation are not taken or copied from the accounts originally made and kept by the chief clerk—that is, so far as they refer to business done under the joint contract—they are not correct and are not in any sense binding upon plaintiff corporation as correct statements of such joint account.)

Ans. I have no doubt that there are entries upon the books of the Nashua and Lowell Corporation covering in amount thirty-
296 one per cent. of the total amount of these transactions; I mean these charges contained in the books referred to in my answer to Int. 30.

Int. 33. Please state what danger existed, if any, of the Salem and Lowell and Lowell and Lawrence railroads falling into the hands of any third person, which led to the purchase of the majority of the stock of said railroads in the interest of the Boston and Lowell and Nashua and Lowell railroads, if you know.

(Objected to because the question assumes that the majority of the stock of said railroad was purchased in the interest of both plaintiff and defendant corporations in this case, whereas it has already appeared in evidence that this purchase was made by and under the authority of a vote passed by the stockholders of the defendant corporation at a meeting of such stockholders held Aug. 7, 1871—that is, at a time prior to any of the entries in the books of account of the defendant corporation, as testified to by this witness in his thirtieth answer.)

Ans. I understood at the time there were persons hostile to the interests of the Boston and Lowell Railroad Corporation, and also the Nashua and Lowell Railroad Corporation, during the continuance of the joint-traffic contract, endeavoring to purchase the stock of these two roads for the purpose of opening a rival line between Lowell and Boston.

Int. 34. Whether or not such danger made it necessary to obtain control of a majority of the stock of said roads.

(Objected to as calling for mere matter of opinion and as not material to the questions at issue.)

Ans. I suppose it did.

Int. 35. What would have been the effect upon the revenues of

the joint roads had the two roads above named passed into the control of parties having interests hostile to the joint roads?

(Objected to as above and as calling for a conjecture of the witness.)

Ans. Ultimately a reduction of revenue.

Int. 36. State whether or not, after said purchase and to the termination of the joint management of the two roads, they continued to receive the benefit and earnings arising from said Salem
297 and Lowell and Lowell and Lawrence railroads in the proportions above named—that is, sixty-nine and thirty-one per cent.

(Objected to because the question assumes that such purchase was necessary to enable the joint roads to obtain the earnings of said Salem and Lowell and Lowell and Lawrence railroads, whereas, in fact, these Salem and Lowell and Lowell and Lawrence railroads were under a lease to the joint roads during the whole term of the joint contract, and this is probably known to the witness.

Plaintiffs' counsel states that, having entered the last objection as above, he asked the witness to hear the objection read before answering the question, and the defendants' counsel objected to the witness being permitted to hear the objection to the question, and thereupon plaintiffs' counsel now states in the hearing of the witness that, as he understands the fact, these roads, the Salem and Lowell and Lowell and Lawrence, were both under lease to the defendant corporation for a term of twenty years from Oct. 1, 1858—that is, during the term of the joint contract—and so could not have been taken away from the two roads by any third party who might acquire a majority of the stock of the two roads in hostility to the joint roads.

Defendants' counsel objects to this instruction as an attempt to instruct the witness under the guise of an objection.)

Ans. They did.

Int. 37. Please examine the papers handed you and state what they are and what periods they cover.

Ans. Statements showing semi-annual settlements between Boston and Lowell and Nashua and Lowell railroads and Boston and Lowell Railroad Corporation from Oct. 1, 1871, to Sept. 30, 1878.

Int. 38. Please read the same as a part of this your deposition, and produce the originals to be marked for identification by the examiner.

Ans. I read as follows:

(It is agreed that the papers read by witness may be marked "Defendants' Exhibit Semi-annual Statements, J. G. S., ex'r," and printed with the other exhibits in this case.)

I produce the originals which I have just read, to be marked for identification by the examiner.

298 (It is agreed that these originals may be retained by the witness, to be produced at any time at the request of either party. It is further agreed that the record made by the examiner

of these papers as read by the witness shall have the same effect as if the originals were put in evidence and retained by the examiner.

The originals referred to are marked for identification as follows: "Original 1, J. G. S., ex'r;" "Original 2, J. G. S., ex'r;" "Original 3, J. G. S., ex'r;" "Original 4, J. G. S., ex'r;" "Original 5, J. G. S., ex'r;" "Original 6, J. G. S., ex'r;" "Original 7, J. G. S., ex'r;" "Original 8, J. G. S., ex'r;" "Original 9, J. G. S., ex'r;" "Original 10, J. G. S., ex'r;" "Original 11, J. G. S., ex'r;" "Original 12, J. G. S., ex'r;" "Original 13, J. G. S., ex'r," and "Original 14, J. G. S., ex'r.")

Int. 39. These papers appear to be accounts of semi-annual settlements of Boston and Lowell railroad with the joint roads. Do you know whether it was the course of business between the joint roads and the two roads to make and adjust similar accounts to these at the same times with the Nashua and Lowell railroad?

(Plaintiffs' counsel objects to this question because it does not appear, as assumed in the question, that the papers referred — are settlements, properly speaking. It only appears that they contain statements made up by the chief clerk, at intervals of six months, of the state of the account as between the Boston and Lowell Corporation and the joint roads; and, although some of these papers are marked or signed at the bottom in these words, "Settled as above, Myron Taylor, chief clerk," and others are signed "Myron Taylor, chief clerk," and others are not signed at all, they really are statements of the account, as made up by the chief clerk, showing the sums due the defendant corporation from the joint roads and nothing more.)

Ans. It was.

Int. 40. How were the amounts found due upon these semi-annual adjustments paid to the Nashua and Lowell road from the funds of the joint roads—I mean the thirty-one per cent. which would be due that road upon these semi-annual adjustments provided for in the joint contract—by draft or in cash or otherwise?

Ans. Until 1875 they were paid by the draft of the man-
299 ager of the joint roads on the cashier of the joint roads; after that date by the check of the cashier of the joint roads.

Int. 41. To whom were such drafts and checks made payable?

Ans. Usually to T. H. Wood, treasurer.

Int. 42. Have you here such original drafts and checks; and, if so, will you produce them that they may be marked by the examiner for identification, and annex copies thereof as a part of this answer?

Ans. I have such drafts down to 1875, and I will look for the checks, and will produce them if I find them. I produce the drafts for identification by the examiner, and I furnish copies thereof.

(It is agreed that the copies furnished by the witness may be marked for identification, by the examiner, Drafts 1 to 17, inclusive, and may be considered in evidence for all purposes as to which the originals would be competent evidence. Draft 1 is as follows:)

DRAFT 1. J. G. S., Ex'r.

(Copy.)

BOSTON AND LOWELL AND NASHUA AND LOWELL RAILROADS,
MANAGER'S OFFICE,

$15,378.59. NASHUA, *May 17th*, 1872.

At sight, after date, pay to the order of T. H. Wood, treasurer fifteen thousand three hundred and seventy-eight dollars and fifty-nine cents, balance due Nashua & Lowell railroad, in settlement of proportion of net earnings for the six months ending March 31, 1872, value received, and charge the same to account of

Your obedient servant,

GEO. STARK, *Manager*.

To C. E. A. Bartlett, cashier.

Boston & Lowell & Nashua Railroads,
Boston, Mass.

No. 2014.

(Indorsed:) T. H. Wood, treasurer.

(On the face is an impression of a stamp containing the following words:) Cashier's office, Boston, Lowell & Nashua R. R., May 23. Paid.

The other drafts need not be printed. They are all of like tenor, and are dated as follows and for the following amounts:

300	Draft 2, Apr. 26, 1872	$20,000 00
	" 3, " 29, "	18,120 00
Draft	4, Apr. 29, 1872	21,880 00
"	5, Oct. 26, "	30,000 00
"	6, " 30, "	21,915 00
"	7, Nov. 4, "	8,423 96
"	8, " 12, "	2,645 16
"	9, Apr. 25, 1873	21,690 00
"	10, " 30, "	7,052 00
"	11, May 23, "	24,801 38
"	12, Oct. 30, "	21,605 00
"	13, " 31, "	5,126 58
"	14, Nov. 13, "	48,248 19
"	15, Apr. 30, 1874	30,000 00
"	16, May 15, "	38,122 02
"	17, Nov. 10, "	30,710 27

(Adjourned.)

SEPT. 12, 1885.

(It is agreed that books of account were kept by the chief clerk of the manager, as provided in the contract and rules and regulations for the management of the joint roads under said contract, in which books accounts were kept of the business of the joint roads, and an account was also kept between the joint roads and each road, which

accounts were semi-annually balanced, and the balances thus found paid by drafts or checks drawn in favor of each road on the funds of the joint roads. It is agreed that the said checks were drawn in the same form as the drafts, the drafts being in the form of Draft 1, heretofore put in evidence, except that they were not drawn directly on the cashier by the manager, but on the bank account of the joint roads by authority of the manager.

It is further agreed that the chief clerk of the manager under the joint contract made approximate monthly statements showing the condition of the accounts and the state of the business and the affairs of the two roads under the joint management, which were submitted to the directors of each road at their monthly meetings; that semi-annual statements of the accounts between the joint management and each road were prepared by such chief clerk and de-
301 livered to each road, showing the receipts and expenses and the net receipts of the joint management, and the proportion thereof of each road. The proportion shown to be due to each road by these semi-annual accounts was paid to it by drafts or checks, drawn as hereinabove stated, and the semi-annual accounts were spread upon the books of each corporation during the same year, and were carried into the annual accounts of each of the two corporations.

Counsel for defendants produces an original paper purporting to be an agreement to submit certain matters in dispute between the Boston and Lowell railroad and Nashua and Lowell railroad, including claims involved in this suit, dated Sept. 30, 1882, and purporting to be signed, on the part of the Nashua and Lowell railroad, by F. A. Brooks, president and committee, and on the part of the Boston and Lowell railroad by J. G. Abbott, president, and submits the same to counsel for complainants, with the request that he will admit the signatures and execution thereof, to the end that the witness may be examined with relation thereto.

Counsel for plaintiffs informs counsel for defendants that while it is true that such a submission was executed between said corporations on Sept. 30, 1882, it is also true that the arbitrators named in said joint submission were, before any final award made by them under the same, notified by the plaintiff corporation of the revocation by it of all power conferred on them by the submission, and that the plaintiff corporation would not be bound by any proceedings of said arbitrators had under said submission; and after such notice of revocation the arbitrators proceeded, in the absence of the plaintiff corporation, to hear the defendant corporation, and after so hearing said defendant corporation *ex parte* proceeded to sign a paper called by them an award in favor of the defendant corporation for the sum of $12,000 and upwards, and then the defendant corporation demanded payment of the said award from the plaintiff corporation, which demand was refused; that thereupon the defendant corporation, in the latter part of the year 1883, brought a suit at law against the plaintiff corporation in the superior court of the county of Suffolk, in the State of Massachusetts, to recover the amount of said award, and the case was duly heard and tried in

said court, and a judgment rendered therein in favor of the
302 Nashua and Lowell Railroad Company, and by said judgment it was determined that the said instrument, signed by said arbitrators and called an award, was wholly void and invalid at law by reason of the same having been made after the power of the arbitrators to act under said submission had been revoked.

Counsel for defendants objects to statement on record, and does not admit the same to be true, except so far as the execution of said paper is concerned.)

Int. 43. Please examine "Defendants' Exhibit 75, J. G. S., ex'r," being the agreement to submit to arbitration the matters therein named, and state whether the signatures thereto are the signatures of J. G. Abbott and F. A. Brooks, as therein appears; whether the arbitrators therein named met from time to time under said agreement; whether the exhibits marked "Exhibit 1" and "Exhibit 2," annexed to said agreement now shown you, are the original schedules and specifications of the claims of the Nashua and Lowell Railroad Corporation against the Boston and Lowell Railroad Corporation and of the Boston and Lowell Railroad Corporation against the Nashua and Lowell Railroad Corporation, presented before said arbitrators for their decision, and whether a hearing was had under said agreement upon said claims.

Ans. I have no doubt the signatures thereto affixed are the signatures of F. A. Brooks and J. G. Abbott. The arbitrators did so meet from time to time. Exhibits 1 and 2 are the schedules submitted, and there were hearings had upon said claims.

Int. 44. Whether or not testimony was offered in relation thereto, and what counsel were present representing the parties?

(Defendants' counsel puts Exhibit 75 in evidence.)

Ans. Testimony was offered, to the best of my recollection. F. A. Brooks, A. S. Hall, and Judge E. R. Hoar appeared for the Nashua and Lowell railroad and John H. George and George F. Richardson for the Boston and Lowell railroad.

(Counsel for defendants asks counsel for complainants to admit the signatures to a paper produced, purporting to be an award, marked "Defendants' Exhibit 76, J. G. S., ex'r," and complainants' counsel admits the signatures to be genuine, and defendants' counsel puts the said exhibit in evidence.)

303 Int. 45. Please state whether or not certain items contained in said schedules annexed to the submission were withdrawn from the arbitrators by agreement and settled between the parties, and point out the items which were so withdrawn and settled.

(Objected to unless the witness produces written evidence as to the matter inquired of.)

Ans. To the best of my recollection only item seven of said Exhibit 2 was so withdrawn and settled.

Int. 46. I call your attention to the item in the ninth claim of the Nashua and Lowell corporation, which is as follows:

"For use of its share of the Boston freight houses and grounds for twenty-two months ending Oct. 1, 1880, being at the rate of five per cent. per annum on thirty-one per cent. of the cost of said premises, $8,738.13."

Was not this item also withdrawn and settled between the parties?

(Objected to as above.)

Ans. My recollection is that it was.

Int. 47. Will you please furnish the examiner a statement of the items so withdrawn and settled, to be made an exhibit in this case?

(Objected to.)

Ans. I will. I now furnish it.

(Statement furnished is marked "Defendants' Exhibit 77, J. G. S., ex'r," and put in evidence.)

Int. 48. Whether or not the award, Defendants' Exhibit 76, was published by the arbitrators and placed in the possession of the Boston and Lowell railroad, and whether it has been in your custody as treasurer of the Boston and Lowell railroad since that time.

Ans. It was so published by the arbitrators and has since been in my custody to this time.

* * * * * * *

304 (Counsel for complainants hands to the examiner an exemplified copy of the record of the superior court for the county of Suffolk, Mass., in the cause of the Boston and Lowell railroad against the Nashua and Lowell railroad, and requests that the same be filed, pursuant to the statement prefixed to the same and signed by him, and requests that it be marked as an exhibit in this cause.

Counsel for defendants objects to the receipt at this time of the said document by the examiner and to the marking of the same as incompetent and irrelevant and as not being in reply or inquired of in the direct examination and as taking the time of defendants allowed for the taking of their testimony.

The document, with the statement of counsel thereto prefixed, is marked by the examiner "Complainants' Exhibit Transcript of Record No. 2, J. G. S., ex'r.")

(Adjourned.)

* * * * * * *

Int. 53. With the exception of this balance now in your hands have all other matters growing out of the joint management of the two roads been settled and adjusted on the joint books and the balances paid over to the separate corporations up to December, 1878, when the joint occupation terminated?

305 (Objected to because it does not appear what is meant by the term "joint books," or that the witness keeps said books, and because the books themselves, whatever they are, are the only competent evidence on the subject, and should be produced.)

Ans. So far as I know, they have.

Int. 54. Whether or not the Peterboro' road was managed by the Boston and Lowell and Nashua and Lowell roads during any part of the time from July 23, 1872, to the termination of the joint contract; and, if yea, how.

Ans. It was operated by the Boston and Lowell and Nashua and Lowell railroads during a certain portion of this time—I think from Jan. 1, 1874.

Int. 55. Prior to that time by whom was said Peterboro' road built?

Ans. It was built by the Peterboro' Railroad Company and leased to the Nashua and Lowell railroad and operated, after its completion, by the Boston and Lowell and Nashua and Lowell roads.

Int. 56. Was that by agreement between the directors of the two roads?

(Objected to.)

Ans. I so understood it to be.

Int. 57. In what proportion were the expenses of operating the Peterboro' road borne by the Boston and Lowell and Nashua and Lowell roads after its completion?

Ans. In the proportion of sixty-nine per cent. for the Boston and Lowell and thirty-one per cent. for the Nashua and Lowell.

Int. 58. Was it a fact that the Boston and Lowell and Nashua and Lowell roads assumed the lease of the Peterboro' road to the Nashua and Lowell and paid the rental in the proportion above stated?

Ans. The rental was paid from the joint funds in the above proportion.

Int. 59. Whether the two roads had whatever increase arose from the operation of the Peterboro' road.

Ans. They did.

Int. 60. Was the Peterboro' road operated at a profit or at
306 a loss from January, 1874, to the termination of the joint contract, in December, 1878?

Ans. It was supposed to be at a loss.

Int. 61. Have you ever figured up the amount of the loss? And, if yea, state, as near as you can remember, what it was.

(Objected to as calling for matter of opinion.)

Ans. I made an estimate of the amount, sixty-nine per cent. of which was $141,439.12.

Int. 62. What was sixty-nine per cent. of the rental paid for said time?

Ans. $112,543.02.

Int. 63. Have you ever known of the Nashua and Lowell railroad offering to reimburse the Boston and Lowell railroad for said loss upon the ground that the directors had no authority to make such an agreement?

(Objected to.)

Ans. I never have.

Int. 64. Whether or not the Nashua and Lowell railroad enjoyed the benefits arising from the lease and operation of the Peterboro' road from January, 1874, to December, 1878.

Ans. They did.

Int. 65. During the time when this station and these improvements were building what was the prevailing rate of interest in the market?

Ans. As I recollect, about seven per cent.

Int. 66. During the construction of the passenger station, whether or not there was a temporary train shed in Boston that was used by the two roads for their joint business.

Ans. There was.

Int. 67. Did the plaintiff corporation have the benefit of that train shed? And, if so, state, as near as you can, what its construction cost.

Ans. It did. As I recollect, it cost about $10,000.

Int. 68. Has the Nashua and Lowell ever paid or offered to pay any part of the cost of that structure upon any ground?

Ans. Not to my knowledge.

Int. 69. Between what termini did the Salem and Lowell
307 road run at the time of the purchase of a majority of its stock by the Boston and Lowell road upon which the Nashua and Lowell paid seven per cent. interest on thirty-one per cent. of the purchase-money?

(Objected to as assuming that the Nashua and Lowell has paid seven per cent. interest on thirty-one per cent. of the cost of the purchase of its shares, the object of this suit being in part to determine whether such sum was not wrongfully withheld from the Nashua and Lowell road by the manager under the contract.)

Ans. Between Tewksbury Junction and Peabody, which, in connection with the Lowell and Lawrence railroad and the Lawrence Branch of the Eastern railroad, made Lowell and Salem its termini.

Int. 70. What were the termini of the Lowell and Lawrence railroad?

Ans. Lowell and Lawrence.

Int. 71. What was necessary to be done in case said Lowell and Lawrence and Salem and Lowell railroads had passed into the hands of hostile parties to have made a line between Lowell and Boston which would compete for the business of the joint roads—I mean the Boston and Lowell and Nashua and Lowell roads?

(Objected to as calling for a matter of opinion and conjecture and not of fact.)

Ans. Nothing, except to have run their trains and opened an opposition line.

Int. 72. Whether or not such a result was discussed and apprehended by the two corporations before making a purchase of a majority of the stock.

(Objected to.)

Ans. It was so discussed, and I have no doubt such a result was feared. I can only speak for the Boston and Lowell railroad. I know it was discussed by one of the directors of the Nashua and Lowell railroad.

Int. 73. State of what commodity the freight between Boston and Lowell largely consisted, and what would have been the effect of a competing line on the joint business.

Ans. The business between Boston and Lowell was a general merchandise business, so far as freight was concerned, the coal business of Lowell at that time being done largely over the Salem
308 and Lowell railroad. The possession of these roads in the hands of parties adverse to the Boston and Lowell railroad would have seriously interfered with that business.

Int. 74. What railroad corporation was so situated at that time that it could have made a competing line between Lowell and Boston had it obtained control of those roads?

Ans. The Boston and Maine railroad.

Int. 75. At that time was or was not the Boston and Maine and its connections adverse to the business interests and connections of the Boston and Lowell and Nashua and Lowell roads at Lowell, Manchester, and other points?

Ans. I understand they were.

Cross-examination by F. A. BROOKS, Esq., of counsel for complainants:

* * * * * * *

309 Cross-int. 81. It seems from your testimony-in-chief that the directions contained in the latter part of vote of July 23, 1872, in these words:

"And the cashier of said two corporations and treasurer of the Boston and Lowell Railroad Company is hereby directed to make up an interest account upon such expenditures to Apr. 1, 1872, and pay the amount found due to the Boston & Lowell R. R. Co. out of the joint receipts of said two corporations."

were not followed. You state that this interest account was made up by you as treasurer of the Boston and Lowell Railroad Company ($6,002.66 in amount), and instead of being paid over by you as cashier at the time out of the joint receipts or funds of the two roads, then in your hands, to the Boston and Lowell Railroad Company or yourself as treasurer it was paid over to you as treasurer of Boston and Lowell Railroad Company by the then treasurer of the
310 Nashua and Lowell Railroad Company out of the separate funds of that corporation, and that this was done (25th answer) as a matter of convenience to the parties. Am I correct in this? And when you say this mode of carrying out the vote in regard to the $6,002.66 was pursued as a matter of convenience to both parties you mean, do you not, as a matter of convenience to yourself as cashier of the joint funds and treasurer of the defendant corporation, and also to the treasurer of the plaintiff corporation?

Ans. You are correct in your first proposition. I mean as a matter of convenience to the treasurer of the Boston and Lowell railroad and to the treasurer of the Nashua and Lowell railroad. My recollection is that that manner of settlement was upon the request of Mr. T. H. Wood, who was treasurer of the Nashua and Lowell road and chief clerk of the joint corporations.

Cross-int. 82. Had that method of making this payment of $6,002.66 any other significance than that it was more convenient, or supposed to be, than the particular method specified in the vote of July 23, 1872, would have been?

Ans. I don't know that it had.

Cross-int. 83. How did this mode of carrying out this part of the vote differ from the vote plan, except that the money received by you from the plaintiff corporation was taken from its separate funds, instead of being taken from its share of the joint funds? Was it not supposed by you and Mr. Wood at the time that this mode of payment was in substance the same as that prescribed in the vote, and that you were practically pursuing the directions contained in the vote, and not disregarding them, except for convenience of bookkeeping?

(Objected to.)

Ans. It was so supposed by me, and I have no doubt by him.

Cross-int. 84. In your twenty-second answer you state that this interest item of $6,002.66 accrued prior to July 23, 1872. Is that statement correct? Did any such interest item ever accrue, in the ordinary sense of that term? Was it not created as a claim in favor of the Boston and Lowell Railroad Company, so far as it exists at all, by the vote of July 23, 1872, and in that vote called interest as and for a period of time then already past, and so, strictly
311 speaking, never interest at all, if interest is understood to mean a sum payable for the use of money loaned?

(Objected to as assuming that the vote of July 23, 1872, was the first agreement on the part of the plaintiff corporation to contribute its proportion to the interest upon the expenditures made by the defendant corporation for the benefit of and at the request of the plaintiff corporation.)

Ans. Your first statement is correct. Interest on all payments made on account of new station in Boston prior to April 1, 1872, was carefully computed from the time of payment to said April 1 and amounted to a sum of which $6,002.66 was thirty-one per cent.

Cross-int. 85. So far as you know, was the Nashua and Lowell Corporation liable in any way, either for the outlay made by the Boston and Lowell or for thirty-one per cent. of the interest thereon, at any time prior to July 23, 1872, the date of the passage of said vote?

(Objected to as calling for an opinion on a matter of law and as incompetent.)

Ans. I suppose they were liable for thirty-one per cent. of the interest from the time the expenditures commenced.

Cross-int. 86. Do you mean they were so liable independently of the vote of July 23, 1872?

Ans. I understand that is covered by that vote.

Cross-int. 87. That is, you mean that the liability was created by that vote, do you not?

Ans. I do.

Cross-int. 88. If this was so how could that vote operate retrospectively so as to carry interest on a sum of money expended before the vote was passed and for a period of time preceding the passage of said vote?

(Objected to as argumentative and incompetent.)

Ans. I don't know. I understood interest was to be collected from the commencement of expenditures, and so understand that vote.

Cross-int. 89. Was it not the custom of the manager of the two roads to present monthly statements of the receipts and expenses of the two roads and of property held by them and each of them
312 under lease, and at the expiration of every six months—*i. e.*, in April and October of each year—to present a like statement covering the preceding six months, contained on printed blanks prepared for this purpose?

Ans. Monthly statements were never presented to me. I believe they were presented by the manager to the directors. Semi-annual statements were made and presented to the treasurer of the Boston and Lowell Railroad Corporation.

Cross-int. 90. Were not these statements or reports of the manager prepared for him by the chief clerk or in the office of the chief clerk?

Ans. They were.

Cross-int. 91. Were they not prepared in duplicate, one being intended for the Boston and Lowell Railroad Company and the other for the Nashua and Lowell Railroad Company?

A. I don't know.

Cross-int. 92. Are you not now in possession of these semi-annual reports of the manager or of those prepared for the Boston and Lowell Railroad Company for the latter years of the contract or since 1872?

Ans. Perhaps some of them; I don't know how many.

Cross-int. 93. Were you not frequently present at the monthly meetings of the two boards of directors held for the transaction of business under the traffic contract, and more or less familiar with what was ordinarily done at those meetings?

Ans. I was sometimes present.

Cross-int. 94. Please look at the paper now handed you and marked for identification by the examiner "Report of joint income and expenses for 6 months to April 1, 1874," and state if this is not one of the statements or reports made up in the chief clerk's office and presented by the manager at these monthly meetings of the directors of the two roads.

Ans. I have no doubt that this paper was made up in the chief clerk's office for the treasurer of the Nashua and Lowell road.

Cross-int. 95. On one side of this sheet is there not a statement of the income or gross receipts of the two roads for the six months ending April 1, 1874, footed up as amounting to $851,896.17 in
313 all, and another column headed "N. & L. R. R. Pro.," showing thirty-one per cent. of said total?

Ans. Yes.

Cross-int. 96. On the opposite side is there not an itemized statement of the expenses of the two roads and leased lines for the same period, one column of figures showing the total of such expenses and another column headed "N. & L. R. R. Pro.," and showing thirty per cent. of such total expenses?

Ans. Yes.

Cross-int. 97. Among the items of expenses in this report is not one entered thus?

	Total.	N. & L. R. R. Pro.
"Rent account	$59,490 52	$18,442 06"

Ans. Yes.

Cross-int. 98. From what you know of the facts in this case is not the item of $59,490.52, under the head of "Rent account," really made up of interest on Boston improvements, S. & L. and L. & L. railroads investments, and Lexington and Arlington and Stoneham Branches, all of which appear as items of expenditure in the printed blanks, with no sums or amounts carried out against them?

Ans. It is substantially so.

Cross-int. 99. It is then true, is it not, that this account includes the interest charged plaintiff corporation on Boston improvements, etc., under the head of rent, or rents, as they are made up by the chief clerk—that is, that such items were entered to the debit of rent account?

Ans. It is.

Cross-int. 100. In the annual reports of the directors of the plaintiff corporation to its stockholders does it not appear that these same sums were also embraced under the item of rents?

(Objected to.)

Ans. I can't say that they do.

Cross-int. 101. Do you find any other item in those reports of expenses under which these interest payments to the Boston and Lowell road could be included, unless it is the item of rents?

Ans. I don't find any other in which they would be likely to be included.

314 Cross-int. 102. Whether or not—as the chief clerk who made up this six months' report examined by you was also at the same time the treasurer of the plaintiff corporation, do you not think it probable that he entered these same interest items in the rent account as treasurer of the plaintiff corporation as he did in making up the accounts as chief clerk of the manager of the joint corporations?

Ans. I have no doubt he did.

Cross-int. 103. In making up your books of account as treasurer of the Boston and Lowell railroad were not these interest charges to the Nashua and Lowell railroad entered by you as interest or interest receipts, and not as operating expenses; if not, how otherwise?

(Objected to because the question assumes that the Boston and Lowell railroad had interest charges against the Nashua and Lowell railroad, whereas the fact is that its interest charge was against the joint roads or the management thereof.)

Ans. With the exception of $6,002.66 no interest was charged directly to the Nashua and Lowell railroad. The charges for these items were made against the joint management.

Cross-int. 104. What I want to know is in what form you entered these sums received as interest on the cost of the Boston improvements, thirty-one per cent. of which was taken out of the plaintiff corporation, after they had come into the treasury of the Boston and Lowell Company. Please state how this is.

Ans. They were entered to the credit of interest account.

Cross-int. 105. And were not entered or treated by you as having anything to do with the expenses of operating the Boston and Lowell road, were they?

Ans. I consider the balance of interest account as an expense.

Cross-int. 106. As a book-keeper, keeping the accounts of the Boston and Lowell road, did you treat this money—to wit, interest on Boston improvements—as belonging to the interest account or as belonging to operating expenses?

Ans. Interest account.

Cross-int. 107. In your 66th answer you state that the temporary shed provided by defendant company during the construction of the new passenger station was used by both corporations,
315 meaning both the plaintiff and defendant corporations. In what sense could the plaintiff corporation use the station of defendant corporation or any temporary provision made for such station.

Ans. Simply through their interest in the joint business.

Cross-int. 108. In the same sense, then, you would say that the Boston and Lowell Company was using the station of the Nashua and Lowell Company at Nashua during the term of the joint contract, would you not?

Ans. It was as necessary for the Boston and Lowell to have a station at Nashua as it was for the Nashua and Lowell to have a station at Boston.

Cross-int. 109. Was not all this matter understood, and was not each corporation to furnish, at its own expense, all the stations on the line of each, for the benefit of the other, under the contract, and to maintain the same at its own separate expense; and was not the division of net earnings predicated upon this understanding and agreement? If not, how otherwise?

(It is agreed that Oct. 1, 1858, leases were executed of the railroads and property of the Salem and Lowell and Lowell and Lawrence Railroad Companies to the Boston and Lowell Railroad Corporation for the term of twenty years from that date, and that under said leases the joint management of the Boston and Lowell and Nashua and Lowell railroads took possession and control of the leased property at that time, and continued to operate the same during the continuance of the joint contract between the plaintiff and defendant corporations.

Defendants' counsel here moves to adjourn to 9 o'clock a. m. to-morrow morning at this place, and to this adjournment complainants' counsel objects, as it is an earlier time than has been heretofore fixed for the time of meeting or convenient to him.

After further conference the examiner adjourns the further taking of evidence to clerk's office of U. S. circuit court at 10 a. m. to-morrow, Sept. 15, 1885.)

(Adjourned.)

SEPT. 15, 1885.

Ans. I don't remember whether the contract so provides or not. Undoubtedly if the business had continued of the same volume
316 as when the contract was entered into no additional facilities would have been needed.

Cross-int. 110. Was not the Boston passenger station, as the same existed in 1869, when an act of the Legislature was procured for the taking of new land to enlarge that station in connection with the Eastern railroad, sufficiently large to enable the Boston and Lowell to receive and deliver from its cars all the passengers then traveling on that road?

(Objected to as new matter.)

Ans. The station was not adapted to the business of the road at that time.

Cross-int. 111. Whether or not it was sufficiently large to enable all passengers going to or coming from said road to reach the cars.

Ans. It was not. There was but one track which could be used to receive or deliver passengers. The increased business demanded additional trains, which could not be accommodated in that building.

(Latter part of answer objected to by complainants' counsel as not responsive.)

Cross-int. 112. If I understand your last answer, you mean that there was not sufficient track room in the old passenger station, and you do not mean there was not sufficient room to enable passengers to reach and enter the cars from the street. Is that so?

Ans. I mean there was not sufficient track room; the entrance and exit of the building were sufficient.

Cross-int. 113. How many tracks did the old passenger station contain?

Ans. Two, only one of which could be used to receive or deliver passengers.

Cross-int. 114. What was the second one good for?

Ans. Substantially for storage of cars.

Cross-int. 115. Was not the width of the old train-house at least half or about half as great as that of the present train-house?

Ans. I don't know.

Cross-int. 116. You have, I believe, been superintendent or manager of the Boston and Lowell road and familiar with its affairs for over fifteen years. Can you not remember that the old train-
317 house or station was about half as wide as the present one; if not, what is your memory on that subject as to the width of the old station?

Ans. I don't think it was half as wide as the present train-house. For an estimate I should say it was not more than one-third as wide. I think it was about fifty feet wide.

Cross-int. 117. Was not the new train-house built sufficiently large to accommodate the trains of the Eastern railroad as well as those of the Boston and Lowell railroad?

Ans. The trains of the Eastern railroad, with some additions, could have been accommodated in the new station, which would have necessitated the addition of wings to the train-house. The ground space was sufficient. I never knew that any different arrangement was made for those trains.

Cross-int. 118. Was it not originally contemplated to provide for the trains of the Eastern railroad in this new building?

Ans. There were some negotiations to that effect which were never carried out.

Cross-int. 119. Was not the land taken for this passenger station supposed to be sufficient for both roads?

(Objected to for substance.)

Ans. The original plan in connection with the Eastern railroad was to take all the land to Lowell street. After the Eastern railroad declined to be a party to taking of land the Boston and Lowell railroad took what it needed.

Cross-int. 120. Did not the negotiations with the Eastern railroad for the joint use of this passenger station continue until the passenger station was nearly finished?

Ans. I can't say about that; very likely they might.

Cross-int. 121. Did you not then understand that room enough could be provided in the new station to accommodate the wants of the Eastern road as the new station was, in fact, built or being built?

Ans. I did, with the addition of the wings before referred to.

Cross-int. 122. Did not the passenger business of the Eastern railroad then and does it not now at the Boston terminus greatly
318 exceed that of the Boston and Lowell—I mean in the number of passengers carried?

Ans. No question about that; it does.

Cross-int. 123. Many times, does it not?

Ans. There are very many more; how many I am unable to say—probably more than double.

Cross-int. 124. Did not the new passenger station of the Boston and Lowell, including the land, cost over $1,200,000?

Ans. I think it did.

Cross-int. 125. Of this expenditure was not the cost of the train-house portion of the station less than half, or not more than half?

Ans. I don't remember.

Cross-int. 126. In view of the fact that the head-house is a very large, elegant, elaborate, lofty, and expensive structure, copied from European models, is it not, in your judgment, probable that that portion of the building, aside from the land, cost more than the train-house in the rear of the same?

(Objected to as incompetent, argumentative, and new matter. Plaintiffs' counsel requests the witness to avail himself of his recollections as treasurer of the Boston and Lowell railroad.)

Ans. Very likely it did; yet the iron-work in the train-house was very expensive.

Cross-int. 127. This elaborate head-house was not actually necessary for passenger accommodation, was it?

Ans. I suppose a less expensive building would have answered the purpose.

Cross-int. 128. So far as passenger receipts were concerned, this unnecessary expenditure on the head-house did not add to them, did it?

Ans. I don't know.

Cross-int. 129. What do you think?

Ans. I suppose additional facilities usually tend to increase business.

Cross-int. 130. Do you consider the unnecessary expenditure of money on the head-house of the passenger station operated to furnish additional facilities to passenger business?

Ans. No, sir.

319 Cross-int. 131. When you stated on the examination-in-chief yesterday that it was necessary to get the control of the majority of the stock of Salem and Lowell and Lowell and Lawrence roads to avoid the danger of these roads being formed into a rival line between Boston and Lowell during the existence of the joint-traffic contract were you aware of the fact that those two roads were held by the joint roads, under leases, for the whole period of the joint-traffic contract?

Ans. I was aware that those two roads were under leases to the Boston and Lowell railroad.

Cross-int. 132. It is not true, although these leases were taken in the name of the Boston and Lowell alone originally, yet that they were, on or about the first day of October, 1858, turned over to the two roads and afterwards held and operated by them on joint account?

Ans. They were operated on joint account until the termination

of the joint-traffic contract. I am unable to answer, not being informed, as to the first part of the question.

Cross-int. 133. Please look at the record in this case, page 75, Ex. 1, Supplemental Contract. Do you not there find an agreement between the joint roads, dated Oct. 1, 1858, by which the Salem and Lowell and Lowell and Lawrence roads or leases thereof previously held by the Boston and Lowell were taken into the joint account for the period of twenty years from the date of such contract?

Ans. I do.

Cross-int. 134. And you were not aware of this until to-day, were you, or else had forgotten it?

Ans. I don't think I was, but if I was I had forgotten it.

Cross-int. 135. It was not, then, in your mind yesterday that the joint roads already held twenty-year leases of these other roads when you said you considered it necessary that the joint roads should purchase a controlling interest in the stock of the Salem and Lowell and Lowell and Lawrence roads in order to prevent the formation of a rival line between Boston and Lowell, was it?

Ans. I didn't know that the joint roads held any lease of the Lowell and Lawrence and Salem and Lowell railroads. If I
320 ever knew of the supplemental contract referred to in my previous answer I had forgotten it.

Cross-int. 136. Did not the Boston and Maine Railroad Company open a second railroad route from Boston to Lowell over its own road from Boston to Andover and thence to Lowell by constructing a new road of about eight miles, and has not that road been in use for many years?

Ans. There is a second route between Boston and Lowell, consisting of the Boston and Maine railroad and the Lowell and Andover railroad, which was opened, I think, about 1874, and is still in use.

Cross-int. 137. I now hand you an unexecuted draft of an instrument purporting to be a contract between the Boston and Lowell Railroad Corporation, party of the first part, and the Nashua and Lowell Railroad Corporation, as party of the second, dated in the year 1875. Please state whether said draft of contract has been in the possession of the Boston and Lowell Railroad Corporation since 1875 and is the same which was presented at the meetings of the directors of the two corporations held during the year 1875.

(Objected to as incompetent, immaterial, and inquiring about new matter not contained in direct examination.)

Ans. I have no doubt it has been in their possession since 1875. I don't know of my own knowledge that it has ever been presented to the directors of either corporation.

Cross-int. 138. State what you do know in regard to this paper, its origin, purpose, and the object for which it was originally prepared, and by whom it was so prepared.

(Same objection.)

Ans. Of my own knowledge I know nothing about it, except what the paper shows for itself.

Cross-int. 139. When and where did you first see this paper and who showed it to you?

(Same objection.)

Ans. I don't know where I first saw it and who first showed it to me.

Cross-int. 140. Have you no recollection on the subject?

321 Ans. I couldn't make any definite answer beyond what I have already stated.

Cross-int. 141. When did you see this paper last, before to-day, and who were present, and under what circumstances and where was it found?

(Same objection.)

Ans. I saw it last when I took it from a box to produce it in answer to a subpœna. It was found in the vault of the treasurer's office of the Boston and Lowell railroad passenger station, and no one was present but myself.

Cross-int. 142. How long had it been in this vault?

(Same objection.)

Ans. I don't know.

Cross-int. 143. Have you no idea how long it had been there previous to yesterday, and is not the vault in your control, as treasurer of the Boston and Lowell Railroad Company?

Ans. I have no definite idea; some years; the vault is in my control, as treasurer.

Cross-int. 144. How long has this vault been in your control, as treasurer?

Ans. Since 1873.

Cross-int. 145. Was the paper placed in the vault by you?

Ans. I have no doubt it was; still, I have no definite recollection.

Cross-int. 146. Will you make this paper, or allow it to be made, an exhibit in this case?

Ans. Yes.

(Paper offered in evidence by counsel for complainants as an exhibit, and the same is objected to as incompetent, irrelevant, and as new matter not inquired of in the direct examination of this witness. Paper is marked "Complainants' Exhibit Draft of Contract, J. G. S., ex'r.")

Cross-int. 147. In whose handwriting is this paper?

Ans. I don't know.

Cross-int. 148. Please look at the handwriting and see if you detect any resemblance in it to that of any person whom you know?

322 Ans. I have already looked, at the request of Mr. Bailey, and I don't know whose handwriting it is.

Cross-int. 149. Whether or not this paper was ever in the posses-

sion of Col. George, the former official attorney of the Boston and Lowell Corporation.

(Same objection as before.)

Ans. I have no doubt it was, but I don't know absolutely.

Cross-int. 150. Did you ever have any conversation with Col. George with regard to this paper or the matter contained therein, or any part of it?

(Objected to as incompetent.)

Ans. I presume I have, but what the conversation was I don't remember.

Cross-int. 151. You knew then of the existence of this paper some time since, did you not, and how long since?

Ans. I did. I am unable to state as to the length of time.

Cross-int. 152. Whether as far back as 1875, when the paper is dated, or thereabouts?

(Same objections.)

Ans. I have no doubt I did.

Cross-int. 153. Whether or not you were consulted by Col. George or any other person in the preparation of this paper or any other paper of a similar character.

(Same objections.)

Ans. I think not. Col. George was not in the habit of consulting me in regard to contracts which he drew up.

Cross-int. 154. Whether or not this paper was prepared by Col. George or under his directions. If not, by whom was the same prepared or drawn up?

(Same objections.)

Ans. I don't know.

Cross-int. 155. From whom was it received by you when you put it in the vault of the defendant corporation?

(Same objections.)

Ans. I don't remember.

Cross-int. 156. Have you no impression or recollection in regard to this matter?

323 Ans. I have no recollection. I presume by Col. George. I have no doubt of it.

(Last part of answer objected to.)

Cross-int. 157. You knew the contents of this paper at the time you put it in the vault, did you not?

Ans. I knew what it purported to be.

Cross-int. 158. Whether or not you understood or now understand it had been drawn up for the purpose of committing to writing in a binding form certain understandings or alleged understandings previously existing in the minds of the directors of the plaintiff and defendant corporations in regard to this matter.

(All questions relating to this paper objected to as being new matter and as incompetent.

In regard to defendants' objection that this matter of inquiry is new, plaintiffs' counsel admits it to be so and concedes the right to defendants' counsel to cross-examine with regard thereto.)

Ans. I know nothing of what was intended by the paper except what it shows for itself. I understand nothing beyond the paper.

Cross-int. 159. Whether or not you understood or believed that this paper had ever been seen by or laid before the directors of the two corporations or any of them at any time.

(Same objections.)

Ans. Mr. Bailey informed me a few days since that it had. I think I have heard so from others, but from whom I don't remember.

(Answer objected to as hearsay.)

Cross-int. 160. Whether or not you have any doubt of this fact.

(Same objections.)

Ans. I have no doubt, from Mr. Bailey's statement, that this was the case.

Cross-int. 161. At what time did Mr. Bailey say that this paper came before the directors? I mean the time of its coming or having come before the directors, according to Mr. Bailey's statement.

Ans. I don't remember that he stated any time.

Cross-int. 162. Whether or not you recollect any other person than Mr. Bailey who gave you similar information.

(Same objections.)

324 Ans. Possibly Col. George. I don't remember any other.

(Adjourned.)

SEPT. 16, 1885.

Cross-int. 163. You have testified, on examination-in-chief, that there was considerable loss sustained by the joint roads in hiring and operating on joint account the Peterboro' road of New Hampshire. Is it not equally true that there was a loss in hiring and operating on joint account Phillips' wharf, in Salem, at the large rent originally paid therefor?

Ans. I have no doubt there was something of a loss through the contract of lease of Phillips' wharf after Mystic wharf was in a condition to accommodate the business transferred to it from Phillips' wharf.

Cross-int. 164. Does not the Boston and Lowell road now hire Phillips' wharf at a rental greatly below that paid by the joint roads for the same?

Ans. They do not hire it.

Cross-int. 165. If they have bought it, did they not before buying it hire it at a rental much below that paid by the joint roads?

Ans. I think not. I think the rental continued the same to the time of the purchase.

Cross-int. 166. What was that rental?

Ans. To the best of my recollection, $23,000 per annum.

Cross-int. 167. What was the price paid in purchasing said property?

Ans. I think $200,000.

Cross-int. 168. What rate of interest on $200,000 is $23,000 per annum?

Ans. Something over ten per cent.

(It is agreed that the examination of this witness may be continued by either party without objection as to the order of examination.)

Direct examination resumed:

Int. 169. As treasurer of the Boston and Lowell railroad, have you the custody of the original contracts by it with other roads?

Ans. I have, of some of them.

Int. 170. I now show you a paper purporting to be an
325 original contract, dated Sept. 26, 1867, between the Connecticut and Passumpsic River railroad, party of the first part, and the Boston and Lowell and Nashua and Lowell railroads, parties of the second part, and to be signed on the part of the parties of the second part by H. Hosford and George Stark, committee, and I ask what that paper is, and whether it is in your custody as such treasurer.

(Objected to because it is not for the witness to say what the paper is, the paper itself being the only competent evidence, and because the paper purports to have been executed in the presence of subscribing witnesses and can only be proved by said subscribing witnesses, the witness Bartlett not being one.)

Ans. The paper is an original contract between the Connecticut and Passumpsic railroad and the Boston and Lowell railroad and the Nashua and Lowell railroad, and is in my custody as treasurer of the Boston and Lowell Railroad Corporation.

Int. 171. Do you know the signatures of H. Hosford and George Stark, by whom it purports to be signed on the part of the Boston and Lowell and Nashua and Lowell railroads, and are their signatures thereto genuine?

(Objected to because the paper purports to be signed in these words, "The Boston & Lowell and Nashua & Lowell R. R. Companies, by H. Hosford and Geo. Stark, committee duly authorized," and there is no evidence in the paper itself that those gentlemen were duly authorized as such committee.)

Ans. I do. I have no doubt the signatures are genuine.

Int. 172. Do you know whether or not the parties to this contract acted under it after its execution?

Ans. I believe they did.

Int. 173. Will you make this contract an exhibit to this deposition, or, if you decline to make the original contract such an exhibit, will you make a copy thereof, known by you to be correct, an exhibit, and present the original to be marked for identification by the examiner?

(Objected to because the contract is not material.)

Ans. I decline to make the original an exhibit, but will permit it to be so marked, and will make a copy thereof, known by me to be correct, such an exhibit.

326 (Original contract is marked for identification "Original contract produced Sept. 16, 1885, J. G. S., ex'r.")

Int. 174. Did the Nashua and Lowell Railroad Corporation receive its share, or thirty-one per cent., of the receipts from the business provided for under said contract, including the terminal charge provided for by article 9 thereof, during the continuance of the joint contract between it and the defendant corporation?

Ans. They did.

Int. 175. I show to you a paper purporting to be an original contract between the trustees and managers of the Vermont Central railroad, party of the first part, the Northern railroad of New Hampshire, party of the second part, the Concord Railroad Corporation, party of the third part, and the Nashua and Lowell and Boston and Lowell Railroad Corporations, parties of the fourth part, dated Feb. 24, 1870, and to have been executed on behalf of said parties, and ask whether the same is in your custody as treasurer of the Boston and Lowell Railroad Corporation, and whether it is the original contract and was executed and acted upon by the parties thereto; and, if so, whether the plaintiff corporation received its share of thirty-one per cent. of the benefits therefrom, including the depot charge provided for in article 9 thereof, during the continuance of the joint contract between it and the defendant corporation? I also ask you to make said contract, or a copy thereof known to you to be correct, an exhibit to this deposition, and to permit said original to be marked by the examiner for identification.

(Objected to for reasons stated in objections to Int. 170, and also for immateriality.)

Ans. It is in my custody, as stated; it is the original contract, so far as I know, and was acted on by the parties. The plaintiff corporation did receive its share, as stated. It was executed by the parties thereto. I decline to make the original an exhibit, but will permit it to be marked for identification. I will make a true copy thereof, to be annexed to my deposition.

(Original contract is marked for identification "Original contract No. 2, produced Sept. 16, 1885, J. G. S., ex'r.")

Int. 176. Do you know the signatures of F. B. Crowninshield, George Stark, and J. G. Abbott, by whom said contract pur-
327 ports to have been executed on behalf of the Nashua and Lowell Railroad Corporation, and the impression of the seal

of that corporation, and are such signatures and impressions genuine or not?

(Objected to because it appears there was an attesting witness to those signatures, and his testimony is requisite to prove the same, or his absence accounted for.)

Ans. Yes to all parts of the question.

Int. 177. Do you know the signature of L. R. Kidder, by whom these signatures purport to have been witnessed, and where he now lives and is? If so, state whether his signature is genuine and where he now lives.

Ans. I do. His signature is genuine. He now lives in New York.

Int. 178. I now show you a paper purporting to be a copy of an original contract, dated the twenty-fourth day of February, 1870, between the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies, parties of the first part, and the Northern Railroad of New Hampshire, the Nashua and Lowell Railroad Corporation of New Hampshire and Massachusetts, and the Boston and Lowell Railroad Corporation of Massachusetts, respectively, parties of the second part, and to be signed on the part of the Nashua and Lowell Railroad Corporation by F. B. Crowninshield and George Stark, committee, and ask if there was an original contract of which that is a copy.

(Objected to.)

Ans. There was.

Int. 179. Have you searched among the papers in your custody to find such original; and, if so, with what success?

Ans. I have; with no success.

Int. 180. Do you know whether the copy of such original contract was acted upon by the corporations purporting to be parties thereto as being a copy of an original contract, and whether the provisions of it, so far as they were to be performed by the Boston and Lowell Railroad Corporation and the Nashua and Lowell Railroad Corporation, were performed during the continuance of the joint contract?

(Objected to as incompetent and immaterial.)

328 Ans. It was so used and acted under.

Int. 181. Do you know whether the Nashua and Lowell railroad, during the continuance of the joint contract, received its proportion of the benefit from the business provided for in said contract, to wit, the business from the road of the Ogdensburg and Lake Champlain Railroad Company?

Ans. It did.

Int. 182. Will you make said copy an exhibit to this deposition?

(Objected to for want of competency.)

Ans. I will make a copy thereof and furnish it to the examiner to be marked as an exhibit.

Int. 183. Do you know whether the contract referred to in said last-mentioned contract as executed on the same day, between the parties of the first part and the Ogdensburg and Lake Champlain Railroad Company, was printed for use by the different roads on the Vermont Central line; and, if it was, will you make one of said printed copies thereof an exhibit to this deposition?

(Objected to as incompetent and immaterial.)

Ans. The contracts were printed together for such use. I will furnish a printed copy to be made an exhibit hereto.

Int. 184. I now show you a paper purporting to be a printed copy of articles of agreement, dated Feb. 24, 1871, between the Northern Transportation Company of Ohio, party of the first part, J. Gregory Smith, of St. Albans, Vt., and George Stark, of Nashua, N. H., parties of the second part, and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Company, the Northern Railroad of New Hampshire, and the Nashua and Lowell Railroad Corporation of New Hampshire and Massachusetts, and the Boston and Lowell Railroad Corporation of Massachusetts, parties of the third part, and the Ogdensburg and Lake Champlain Railroad Company, party of the fourth part, and to have been executed on the part of the Nashua and Lowell Railroad Corporation by F. B. Crowninshield, J. G. Abbott, and George Stark, committee, and to relate to the business to be brought to the Vermont Central line by the boats of the Northern Transportation Company at Ogdensburg, and ask whether there was such an original con-
329 tract, which was printed for use by the parties and was acted upon by said parties as a correct copy of such an original contract.

(Objected to as an attempt to prove the existence of an original from a copy, thus reversing the usual order of evidence.)

Ans. There was such a contract, and it was printed for use and acted upon by the parties thereto.

Int. 185. Will you make one of said printed copies an exhibit to this deposition?

(Objected to as incompetent and immaterial.)

Ans. I will furnish a printed copy to be annexed as an exhibit hereto.

Int. 186. I intended to have asked whether you have the original contract in your custody or control, and I now ask that?

Ans. I have not.

Int. 187. Do you know who acted as general manager of the Vermont Central line under the provisions of the third article of the contracts between the Nashua and Lowell Railroad Corporation and other roads, dated Feb. 24, 1870, which is Exhibit 79?

Ans. I do; George Stark.

Int. 188. What was the length of the line of the roads of the corporations, parties to these contracts, of which you have testified?

Ans. The distance from Boston to Ogdensburg was four hundred and three miles, I think.

Int. 189. Do you know about the length of the Passumpsic road and its tributary roads?

Ans. I don't remember.

Int. 190. Between what points did it extend? Give such description of it as you can.

Ans. It runs from White River Junction, in Vermont, to Sherbrook on the Canada line.

Int. 191. Were these contracts being carried out and was the business contemplated by them being received and done over the line of the Nashua and Lowell and Boston and Lowell roads at the time the terminal improvements in Boston of the Boston and Lowell road were made or decided upon?

Ans. They were, and the business was being done.

Int. 192. Did the Boston and Lowell railroad borrow money
330 to make these improvements; and, if so, at what rate and upon what time? State what you know about this.

Ans. They did borrow the money to make these improvements at seven per cent. rate for twenty years from April 1, 1872, and issued their twenty-year bonds therefor.

Int. 193. Did the Salem and Lowell road have any physical connection with the road of the Boston and Lowell railroads?

Ans. It did not.

Int. 194. You have stated that the Lowell and Lawrence and Salem and Lowell and Boston and Maine railroads, if operated together, would create a competing line to the Boston and Lowell railroad between Boston and Lowell. Do you know whether, at any time before the Salem and Lowell and Lowell and Lawrence were controlled by the Boston and Lowell, these roads were actually operated as such a competing line?

(Objected to because the time of such operation of the two roads as a competing line between Lowell and Boston must have preceded the time of the joint-traffic contract under consideration, and is therefore immaterial.)

Ans. I do know that they were.

Int. 195. Was such competition beneficial or detrimental to the Boston and Lowell railroad?

(Same objection.)

Ans. Detrimental.

Int. 196. To what extent; much or little?

(Same objection.)

Ans. Much; seriously detrimental.

(Adjourned.)

SEPT. 22, 1885.

(Witness says:) I produce the copies which I have said I would produce. I have examined said copies and know them to be true copies of the originals.

(Copy of contract produced, dated Sept. 26, 1867, and referred to in Ints. 110 to 174 and answers thereto, is marked "Defendants' Exhibit 78, J. G. S., ex'r."

Copy of contract produced, dated Feb. 24, 1870, and referred
321 to in Ints. 175 to 177 and answers thereto, is marked "Defendants' Exhibit 79, J. G. S., ex'r."

Copy of contract produced, dated Feb. 24, 1870, and referred to in Ints. 178 to 182 and answers thereto, is marked "Defendants' Exhibit 80, J. G. S., ex'r."

Copy of contract produced, dated Feb. 24, 1870, and referred to in Int. 183 and answer thereto, is marked "Defendants' Exhibit 81, J. G. S., ex'r."

Copy of articles of agreement produced, dated Feb. 24, 1871, and referred to in Ints. 184 to 186 and answers thereto, is marked "Defendants' Exhibit 82, J. G. S., ex'r."

Exhibits 78, 79, 80, 81, and 82 are put in evidence by defendants.)

C. E. A. BARTLETT.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of Charles S. Mellen.

Direct examination by J. H. BENTON, Jr., Esq., of counsel for defendants:

BOSTON, *Sept.* 19, 1885.

Int. 1. What is your full name, age, residence, and business, and what has been your business? State fully, and if you have been connected with any railroad corporations state what, when, and in what capacities.

Ans. Charles S. Mellen; thirty-four; Arlington, Mass.; am general superintendent of Boston and Lowell railroad. I was connected with the Northern railroad as chief clerk, cashier, and assistant treasurer from 1873 to 1880. Since 1880 I have been connected with the Boston and Lowell, and for about a year and a half, in 1881 and 1882, was auditor of the Concord railroad in addition to my duties with the Boston and Lowell railroad.

Int. 2. Are you familiar with the provisions of the contracts dated the twenty-fourth day of February, 1870, copies of which are Defendants' Exhibits 79, 80, and 81 to the deposition of C. E. A. Bartlett, a witness for defendants in this cause?

Ans. I am.

332 Int. 3. Do you know the number of miles of railroad owned or operated by the various railroad companies, parties thereto, at the time they were made? If so, state it in such detail as you are able.

Ans. I do know. The contracts referred to covered the business of the Ogdensburg and Lake Champlain railroad, one hundred and eighteen miles long; the Vermont Central and Vermont and Canada railroads between Rouse's Point and White River Junction, one hundred and forty-four miles; branch from Essex Junction to Burling-

ton, eight miles; the line known as the Montreal and Vermont Junction and Swanton Branch of the Vermont and Canada railroad, forty-three miles; the Stanstead, Shefford and Chambly road from St. Johns to Waterloo, P. Q., forty-three miles; the Northern railroad of New Hampshire from White River Junction to Concord, N. H., including the Bristol Branch of said road, eighty-three miles; the Concord railroad, including the Manchester and Lawrence railroad and the Concord and Portsmouth railroad, about one hundred miles in all; the Nashua and Lowell railroad, fourteen miles; the Boston and Lowell railroad from Boston to Lowell, Lowell to Salem, and Lowell to Lawrence, the Stoneham Branch and the Woburn Branch, about sixty-one miles.

Int. 4. Please give the same information, if you can, with reference to the mileage and connections of the Connecticut and Passumpsic River railroad, the party to the contract with the Nashua and Lowell railroad, which is Exhibit 78 of said Bartlett's deposition.

Ans. In 1867 the Passumpsic railroad extended from White River Junction to Newport, Vt., about one hundred miles. At about the time of the execution of the contract of Feb. 24, 1870, the Passumpsic railroad extended its road from Newport, Vt., to Sherbrooke, P. Q., about forty-five miles, and built a branch from Stanstead Junction to the village of Stanstead, P. Q., about two miles.

In my answer to Int. 3 I omitted to mention the Grand Trunk railway connecting at St. Johns, P. Q., which, with its controlled roads at the time the contract referred to was executed, comprised about 1,200 miles of road.

Int. 5. Do you know the extent of the tonnage of freight
333 business of the Northern Transportation Company at the time the contract was made by the Nashua and Lowell Railroad Corporation, which is Defendants' Exhibit 82 to deposition of C. E. A. Bartlett? If so, state it.

Ans. I do know, approximately, the tonnage or tons transported by the Northern Transportation Company and the Nashua and Lowell and Boston and Lowell roads, if that is the meaning of the question, as I understand it to be. I should estimate there were in the vicinity of 75,000 tons of freight transported yearly.

Int. 6. Give, if you can, the extent of the business—in tons of freight and number of passengers—which came to the Nashua and Lowell and Boston and Lowell railroads from these railroads and boats in the years 1870 and 1871.

Ans. I should estimate the business in tons to have been in the vicinity of 300,000 tons annually. As to the passenger business, I am unable to state at the present time, but will prepare a statement of the passenger business and send it to the examiner to be annexed to this answer.

(Statement subsequently received by the examiner and marked "Defendants' Exhibit 88, J. G. S., ex'r.")

Cross-examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

Cross-int. 7. Is not the passenger station of the Eastern railroad in Boston of much smaller dimensions than that of the Boston and Lowell?

(Objected to as incompetent and new matter not inquired of in direct examination. Counsel for plaintiffs states that, so far as he examines the witness as to new matter not inquired about in the direct examination, he makes the witness his own, subject to cross-examination thereon by defendants' counsel, and does not deem it necessary to have the witness called by the plaintiffs to give a separate deposition in their behalf.)

Ans. It is.

Cross-int. 8. Has it not been so ever since the erection of the new Boston and Lowell station?

Ans. I think it has been.

334 Cross-int. 9. At the time of the erection of this new passenger station, about thirteen years ago, was not the passenger business of the Eastern railroad larger in number of passengers carried than that of the Boston and Lowell railroad?

Ans. I should think so, but I cannot state exactly.

Cross-int. 10. Was not this passenger business of the Eastern, as compared with the Boston and Lowell, much larger thirteen years ago than it is now—*i. e.*, has not the suburban passenger business of the Boston and Lowell greatly increased within a few years past?

Ans. I should think the passenger business of the Eastern railroad was then fully as large, as compared with that of the Boston and Lowell railroad, as it is to-day. The suburban business of the Boston and Lowell has increased very largely for the last three or four years, but I do not think more than that of the Eastern road.

Cross-int. 11. Do you, as a railroad man, think it was necessary thirteen years ago to erect this new passenger station at Boston to accommodate the then passenger business over the Boston and Lowell road?

Ans. I think it was necessary to erect a new passenger station. I do not hesitate to say, however, that had the matter been in my charge the present station would not have been erected. I refer in this latter part of my answer more to the style of the building than to any excess of accommodations given to the public.

Cross-int. 12. Why was it, in your judgment, necessary for the Boston and Lowell, thirteen years ago, to erect a new passenger station in Boston? Was not the old station sufficiently large to enable all passengers desiring to travel on the road to reach and leave the cars for that purpose?

Ans. I do not think that the station was sufficiently large to enable all passengers to reach and leave the road with safety to themselves and economy to the road. I know it was the subject of serious complaint—the accommodations furnished by the Boston and Lowell road—while I was connected with the Northern road; and from my

connection with the Northern road I know that the roads north of that, in the business of which the Northern road was greatly interested, were desirous of better accommodations, and could have obtained the same by diverting their business from both the Northern and the Boston and Lowell roads.

335 Cross-int. 13. You say that a new passenger station was necessary, in your judgment, as a matter of economy on the part of the Boston and Lowell road and as a matter of greater safety to passengers over that road. Whether or not the number of passengers was materially diminished or lessened by reason of a defective or inconvenient passenger station at Boston.

Ans. I cannot state the actual facts, so far as the passenger business of the Boston and Lowell railroad at that time was concerned, but my judgment is that unless better accommodations had been furnished there would have been a material reduction both in the passenger income of the Boston and Lowell road and in the number of passengers carried.

Cross-int. 14. You can probably recollect the time when large railroads spent very little money on passenger stations. Whether, in your judgment, it is necessary to spend money on passenger stations in order to attract passenger travel over railroad lines—that is, whether passengers are governed by such considerations in the selection of railroad routes taken by them.

Ans. I can remember the time when very little attention was paid by railroads to passenger station accommodations, but, so far as my personal experience with the railroad business is concerned, that was a time when there was very little competition between the roads centering in Boston. My judgment is there is no one thing that tends to attract passenger travel or determine a passenger in favor of one route as against another as attractive station accommodations. I know of no one thing to-day on the Boston and Lowell railroad that causes me more trouble and annoyance than the fact that previous managements of the road have, outside the city of Boston, paid so little attention to this matter. I believe our existing business can be largely increased by a large expenditure on our road in this direction, and have recommended and obtained appropriations which I am already expending for this purpose.

Cross-int. 15. It has been stated by other witnesses in this case that the old passenger station taken down in 1871 or thereabouts, with the land covered by it, had cost or was worth about $500,000, and that the new passenger station, with the additional land purchased, has cost $1,200,000 or thereabouts, thus making in

336 destruction of old and erection of new buildings and in land purchases an expenditure of $1,700,000 in substituting the new passenger station for the old. Please state how large an outlay was, in your judgment, necessary to convert the old passenger station, with the land under and additional land to be purchased therefor, into a station sufficiently commodious for the passenger business of the Boston and Lowell road fifteen years ago.

Ans. I do not have definite enough knowledge as to the condition

of the old passenger station to form any valuable estimate of the alterations that would have been required to have built it over into a new station. Whether part of it could have been used in the construction of the new station I cannot say. I should state, if it was not practicable to use any portion of the old station in the construction of the new, it would be unfair to include in the cost of the existing station any valuation that was placed on the old building, which would have been practically worn out and used up in the service of the road. I do not think any too much land was acquired for station purposes. I have always been of the impression that the station itself cost too much money.

Cross-int. 16. Whether or not you are aware that in planning the new station it was contemplated and expected that the Eastern railroad would be furnished with passenger accommodations therein as well as the Boston and Lowell.

Ans. I have understood—I have no knowledge—that the committee of the directors of the Boston and Lowell and Nashua and Lowell roads, who had the construction of this station in charge, did contemplate having the Eastern railroad use it in common with the Boston and Lowell railroad, but from the fact that before it was completed there was a failure on the part of the two roads to agree upon the rental that was to be paid by the Eastern railroad for the use of the station the building has never been completed as planned, and I have no doubt the expense was materially reduced or a large expenditure saved.

Cross-int. 17. Are not the passengers over the Boston and Lowell road to and from points beyond the State of Massachusetts very few as compared with the number of passengers between points inside the limits of Massachusetts?

Ans. I should say they are. My impression would be that
337 about two-thirds of the passengers using the Boston station came from points within Massachusetts.

Cross-int. 18. Whether or not it was, in 1870–'71, necessary to enlarge the Boston passenger station of this road in order to accommodate those passengers who arrived at or left Boston from or to points beyond the State line of Massachusetts.

Ans. I cannot say. I know at the time the station was constructed it was expected the business of the road, both passenger and freight, would increase very largely within the next few years. Whether or not the road could have got along with the old station for a few years longer had there been no expectation of this increase I do not know. On this subject others would be more competent to express an opinion than myself. I believed the interests of the road at that time and for some years previously were suffering for the lack of proper passenger accommodations; and when I refer to the interest of the road I assume that interest to have been to have secured the largest amount of passenger business possible from its own stations and from those on roads connecting with it.

Cross-int. 19. Whether or not you are aware that it appears from the annual reports of the directors of the Boston and Lowell road for the financial years 1874, 1875, and 1876 that, as compared with

the year 1873, the passenger earnings of the Boston and Lowell fell off very considerably.

Ans. I was not aware of this fact; but if the reports do so show they do not indicate the actual condition of affairs as regards the passenger business on the road, for this reason: the passenger earnings of Boston and Lowell railroad, as shown in the annual reports referred to, are not the actual passenger earnings of that road at all, but are, on the contrary, sixty-nine per cent. of the earnings by contract of the Boston and Lowell railroad operated in connection with the Nashua and Lowell railroad, and I should assume that the passenger earnings of the Boston and Lowell road were much larger than sixty-nine per cent. of the total passenger earnings of the two roads.

Cross-int. 20. Whether or not, in making the assumption stated in your last answer, you would not also be obliged to assume that the directors by whom the annual reports of 1874, 1875, and
338 1876 were signed had made a great mistake when they announced the fact that such earnings had fallen off from the passenger earnings of 1873.

Ans. No, sir; I don't think so, for this reason: that if such a fact is announced in the reports referred to it would refer to the contract earnings of the Boston and Lowell railroad and not to the actual earnings of that road; and having operated or been connected with the operation of both roads, the Boston and Lowell for a period when it was operated independently of the Nashua and Lowell, and again after it had absorbed the Nashua and Lowell railroad by lease, I feel positive that a division of thirty-one per cent. of the gross earnings of the passenger business and of the freight business of the two roads is much more than the Nashua and Lowell railroad can earn. Therefore I assume that sixty-nine per cent. of the gross earnings from passenger business in the annual reports referred to is less than was earned upon the Boston and Lowell railroad in those years.

Cross-int. 21. If I understand your last answer, you are of the opinion, from your experience within the past few years, that the directors and stockholders of the Boston and Lowell road, in making the contract with the Nashua and Lowell Company for pooling the earnings of the two roads and giving the Nashua and Lowell thirty-one per cent. and the Boston and Lowell sixty-nine per cent. of the whole, made a contract too favorable to the Nashua and Lowell railroad. Am I correct in this?

Ans. Your question refers to the justice or equity of the contract at the time it was made between the Nashua and Lowell and Boston and Lowell railroads. I do not know but what the division of income made by that contract at the time it was entered into was an equitable one to all parties. I believe, however, that the income of the Boston and Lowell railroad increased to a very much greater extent than that of the Nashua and Lowell railroad, and, at the time referred to (1871–2), the Nashua and Lowell railroad derived an advantage from that contract which they were entitled to.

Cross-int. 22. Whether or not, since 1871–2, the Boston and

Maine Railroad Company have not opened another line between Boston and Lowell, which has operated to the prejudice of the Nashua and Lowell railroad as a party to the joint-traffic contract.

339 Ans. The Boston and Maine railroad has opened another route between Boston and Lowell, and this has doubtless operated to the detriment of both parties to this contract; but that detriment has been more by occasioning an increased expense of operation than by any diminution of receipts, and in this connection I wish to state my opinion that but for the superior station accommodations of the Boston and Lowell railroad at Boston the detriment to the earnings of both roads would have been very much greater than it has been.

Cross-int. 23. Whether or not the passenger station of the Boston and Maine in Boston is not nearer the center of business and population in Boston than the passenger station of the Boston and Lowell, and equally commodious in its internal arrangements with that of the Boston and Lowell—I mean for passenger accommodations?

Ans. The passenger station of the Boston and Maine railroad is nearer the center of business and of population in the city of Boston, and the fact that it is so has rendered it necessary for the Boston and Lowell railroad to offset, by more liberal accommodations in other respects, this advantage. The station of the Boston and Maine railroad is not so commodius or so conveniently arranged for a passenger business as that of the Boston and Lowell road, and the fact that the Boston and Maine directors have publicly announced that they must have better accommodations for their business than they now enjoy, and have petitioned for authority to rearrange their whole passenger terminals in the city of Boston, would seem to me to put this beyond dispute.

Cross-int. 24. So far as facility of access to the cars is afforded by any railroad station, is not the Boston and Maine passenger station in Boston as favorably arranged as any other in Boston?

Ans. No, sir; I don't think it is. The Boston and Lowell and several others are better.

Cross-int. 25. Is it not true that for many years after the new passenger station of the Boston and Lowell road was built that station was inaccessible directly from the street in front of it by doors opening on the street, and that all passengers taking the cars were

340 obliged to go down the side of the station, a hundred feet or so, in order to enter the train-house, and the same to leave the same?

Ans. It is true that the committee of the directors of the Nashua and Lowell and Boston and Lowell railroads, who had charge of the construction of the station, considered this method of entrance to be of great advantage.

Cross-int. 26. Do you consider anybody but George Stark responsible for the erection of a very elegant and expensive station upon Causeway street, the wall of which, fronting on said street, was not provided with doors or entrances from the street, and the only

access to which was by side entrances at considerable distances from the street?

Ans. I do. I consider that the directors of the Nashua and Lowell and of the Boston and Lowell railroads assumed all responsibility for the erection of that station, in that George Stark was merely the agent through whom they acted. If the plans were faulty and the construction not what it should have been, it was through the negligence, or lack of attention, or incompetence, or whatever you may call it, of the board of directors who allowed him to do as he did. I understand it that the directors are the corporation and are responsible for the acts of the agents through whom the road is operated.

Cross-int. 27. If I understand you correctly, you suppose that in the erection of this new station in Boston, as the property of the Boston and Lowell Corporation, Mr. Stark was acting as the agent of the Nashua and Lowell railroad directors as much as he was as the agent of the Boston and Lowell railroad directors; am I correct in this?

Ans. I understood that George Stark, in the matter of the erection of the station, acted as the agent or executive officer of a committee of both boards of directors, the Nashua and Lowell and Boston and Lowell.

Cross-int. 28. Before the new passenger station was provided with openings directly from Causeway street, do you think it was suitable or convenient for the accommodation of passengers?

Ans. I do not.

CHAS. S. MELLEN.

Attest: JOHN G. STETSON, *Examiner.*

341 *Deposition of William S. Gardner.*

Direct examination by A. A. STROUT, Esq., of counsel for defendants:

BOSTON, *Sept.* 22, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. William S. Gardner; fifty-seven; Newton, Mass.; and am one of the associate justices of the superior court of the Commonwealth of Massachusetts.

Int. 2. Were you one of the arbitrators under the agreement between the Nashua and Lowell Railroad Corporation and the Boston and Lowell Railroad Corporation, marked "Exhibit 75," now shown you, and whether or not said exhibit is the original before the arbitrators, with the schedules thereto attached?

Ans. I am. This is the original before the arbitrators, and I have no doubt the schedules were attached, except Exhibit 9, which, as I understand it is agreed, was attached afterwards as an amendment and was before us.

Int. 3. Who were associated with you as arbitrators?

Ans. Mr. Elias Merwin and Judge Waldo Colburn, then on the supreme judicial court of Massachusetts.

Int. 4. State whether or not the arbitrators met the parties, and whether the hearing continued from time to time by adjournment.

Ans. All the arbitrators met the parties, and the case was continued from day to day to hear evidence. On the first day the Nashua railroad was represented by Judge Hoar and Mr. Brooks, and the Boston and Lowell Railroad by Col. George and Mr. Richardson, and the same counsel continued at the various adjournments and hearings.

Int. 5. Please examine Defendants' Exhibit 76, now handed you, and state whether the same is the original award made by the arbitrators therein named under the agreement above referred to, and whether the same, after its signature, was published by the arbitrators and given to the Boston and Lowell Railroad.

Ans. This is the original award signed by each one of the arbitrators Aug. 7, 1883, and the same was published to the parties. I think this original was given to the Boston and Lowell rail road.

342 Int. 6. Refreshing your recollection from the original award, Exhibit 76, will you please state whether, by agreement of the parties, any of the claims submitted to the arbitrators were selected and considered by the arbitrators separately? And, if yea, please state what claims were so selected and separately considered by you.

Ans. In the early part of the hearing, I think upon the first day, it was agreed by the parties that the arbitrators should first hear, consider, and determine the claims of the Nashua and Lowell Railroad Corporation marked "Nos. 3, 4, 5 and 6" in their statement of claims annexed to the agreement to refer, entitled Exhibit 1, before entering upon a hearing of any other claims of either party under such submission. With the request and at the consent of both parties, the arbitrators thereupon proceeded to hear the respective parties in reference to said 3d, 4th, 5th, and 6th claims of the Nashua and Lowell Railroad Corporation, and fully heard and considered the proofs and arguments of the said parties with reference thereto.

Int. 7. State whether or not the arbitrators subsequently met the parties and their counsel and announced their award and determination in relation to said items, and if you answer in the affirmative, state whether, according to your recollection, such award and determination was in writing, whether it was signed by the arbitrators, and the circumstances connected with its announcement.

Ans. On the 23d of May, 1883, at the office of Mr. Merwin, in Boston, the arbitrators made their first award and determination in respect to said claims, and announced the same to the said parties, who were present by their said respective counsel. This award was in writing and was read to the parties by Mr. Merwin, chairman of the board of arbitrators, each of the other arbitrators being present. My recollection is that this award was originally prepared by Mr. Merwin, was in his handwriting, that it had been previously read to the board of arbitrators and assented to by them, and that it was not signed by any of the arbitrators.

Int. 8. Please refresh your recollection from the award, Exhibit

76, handed you, and state, according to your best recollection, what the decision and award so announced by the arbitrators was.

(Objected to, that inasmuch as it appears that the award was in writing it is not capable of proof by parol.)

343 Ans. According to the best of my recollection, the award which was read by Mr. Merwin, as above stated, was as follows:

"Several of the claims made by the Nashua and Lowell Railroad Corporation against the Boston and Lowell Railroad Corporation were, by consent of both parties, submitted to the referees for their award and determination with the understanding and reservation that the remaining claims made by the respective parties were to remain open, either for adjustment by the parties themselves or for future hearing and determination by the referees. The items submitted to the referees, and upon which they have been requested to pass, are those numbered 3, 4, 5, and 6 in Exhibit 1, annexed to the agreement of reference. The referees have considered these items and are of the opinion, and so award and determine, that the Nashua and Lowell Railroad Corporation is not entitled to recover anything from the Boston and Lowell Railroad Corporation in respect to either of said items."

Int. 9. After the announcement and publication of the award testified to in your last answer, please state whether any further testimony in relation thereto was offered by either party, and whether there was any change ever made by the arbitrators in said award after the same was published by them.

Ans. There was not.

Int. 10. Have you the written award to which you have testified; and, if not, where is the same to be found, so far as you know?

Ans. I have not the original written award, and the last I saw of it it was in the hands of Mr. Merwin.

Int. 11. Whether or not, after the publication of said award, the hearing was adjourned with the consent of the parties.

Ans. It was, by agreement of all parties, adjourned to June 29, 1883, at Boston.

Int. 12. Was said award ever withdrawn by the arbitrators, to your knowledge?

Ans. It was not.

Cross-examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

Cross-int. 13. Are you aware that a suit was afterwards brought by the Boston and Lowell Railroad Company *v.* The Nashua and Lowell Railroad Company to recover the amount awarded to
344 this company by the Exhibit No. 76; and that it was finally adjudged by the court of which you are an associate justice that the power of the arbitrators had ceased by revocation of the Nashua and Lowell Railroad Company before any final award by the arbitrators, or to that effect?

(Objected to as new matter, not inquired of in the direct examination, as incompetent and immaterial, and as misstating such decision as the superior court may have made.)

Ans. I know that the superior court gave judgment for the Nashua and Lowell railroad in a suit brought by the Boston and Lowell railroad to recover the amount awarded by the first award. I did not sit in the trial of this case.

WM. J. GARDNER.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of William H. Coolidge.

Direct examination by JOSIAH H. BENTON, Jr., Esq., of counsel for defendants:

BOSTON, *Sept.* 23, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. William H. Coolidge; twenty-six; Natick, Mass.; lawyer; practising in Boston.

Int. 2. Are you now in the employment, as assistant counsel at Boston, of the Boston and Lowell Railroad Corporation, and have you examined and become familiar with the special laws of the Commonwealth of Massachusetts in relation to said corporation and to the Salem and Lowell and Lowell and Lawrence railroads, and also with the general laws of said Commonwealth with reference to contracts or leases between railroad corporations?

Ans. I am so employed and have made such examination, and have made myself familiar with the laws above stated.

Int. 3. Was there any special statute of the Commonwealth of Massachusetts in force on Oct. 1, 1858, which authorized the Boston and Lowell Railroad Corporation to take a lease of the Salem and Lowell railroad or Lowell and Lawrence railroad, or which
345 authorized the Salem and Lowell Railroad Corporation or the Lowell and Lawrence Railroad Corporation to lease their respective roads to the Boston and Lowell Railroad Corporation?

Ans. There was no such statute.

Int. 4. Was there any general statute of the Commonwealth of Massachusetts in force Oct. 1, 1858, which authorized the lease of one railroad by another railroad corporation?

Ans. There was not.

No cross-examination.

WILLIAM H. COOLIDGE.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of Henry A. Church.

Direct examination by JOSIAH H. BENTON, Jr., Esq., of counsel for defendants:

BOSTON, *Sept.* 24, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Henry A. Church; sixty; Cohasset, Mass.; I am and have been treasurer of the Ogdensburg and Lake Champlain Railroad Company for nineteen years.

Int. 2. Have you, in your custody as such treasurer, the original articles of agreement described in direct Int. 184, in the deposition of C. E. A. Bartlett, on page 328 of the printed record, known as the Northern Transportation Company contract, dated Feb. 24, 1871, and are the signatures thereto genuine, and is or is not the printed copy thereof furnished by Mr. Bartlett as Exhibit 82 to his deposition a copy which was used and acted upon by the parties thereto?

(Objected to as wanting in definiteness, incompetent, and calling for information as to signatures which the witness would not, by the paper produced, be qualified to give or allowed to give.)

Ans. I have the original articles of agreement referred to and I have them here for inspection. To my best knowledge and belief, the signatures are genuine. I should say the copy furnished by Mr. Bartlett is one of the printed copies used and acted upon by the parties. I have not examined it word by word, but I believe it to be correct.

346 Int. 3. Have you in your custody as such treasurer the original contract, dated Feb. 24, 1870, described in direct Int. 178, in the deposition of C. E. A. Bartlett, on page 327 of the printed record, and are the signatures thereto genuine, and is or is not the printed copy thereof furnished by Mr. Bartlett as Exhibit 80 to his deposition a copy which was used and acted upon by the parties thereto?

(Objected to as incompetent and calling for information which must be furnished by producing the paper itself, no paper yet being produced by the witness as the original.)

Ans. I have in my custody the contract described. It is at the present moment in the hands of Mr. Sidney Bartlett, counsel for the Ogdensburg road, who is out of the city. As to the signatures, I wish to refresh my recollection by inspection of the original contract. The printed copy furnished by Mr. Bartlett as Exhibit 80 is one of the printed copies used and acted upon by the parties thereto. I have not made a careful comparison of it with the original.

(Adjourned.)

SEPT. 25, 1885.

Int. 4. Have you now here the original contract referred to in the last question and answer, and will you make it an exhibit to this deposition; or, if you decline to make the original an exhibit, will you make a copy thereof an exhibit?

(Objected to as immaterial, and defendants are required to prove the signatures and execution of any instrument desired to be put in evidence.)

Ans. I have the original contract here. I know the following signatures to be genuine: The Trustees and Managers of the Vermont Central and Vermont and Canada railroad; there are four signatures here and I know two of them to be genuine—J. Gregory Smith and B. P. Cheney; the Boston and Lowell Railroad Corporation, signing by their committee, F. B. Crowninshield, J. G. Abbott, George Stark; the Nashua and Lowell Railroad Corporation, by their committee, F. B. Crowninshield, George Stark. The other signatures I do not know. I decline to make this original contract an exhibit, but I will furnish a copy, known to me to be a true copy, to be annexed to this deposition as Defendants' Exhibit 83.

347 (Defendants' counsel requests the examiner to compare the copy furnished by the witness with the original, and to attest it as a true copy if he finds it to be a true copy, and the examiner compares and attests it accordingly.

Copy furnished by the witness, attested by the examiner, is marked "Defendants' Exhibit 83, J. G. S., ex'r," and put in evidence.)

Int. 5. Will you make the original articles of agreement referred to in Int. 2 of this deposition an exhibit, or, if you decline to make the original an exhibit, will you make a copy thereof an exhibit?

Ans. I decline to make the original an exhibit, but I will furnish a copy thereof, known to me to be a true copy, to be annexed to this deposition as an exhibit.

(Defendants' counsel requests the examiner to compare and attest the same, as requested, with regard to the last copy produced by the witness, which the examiner does.

Copy furnished by the witness, attested by the examiner, is marked "Defendants' Exhibit 84, J. G. S., ex'r," and put in evidence.)

Cross examination by ALFRED S. HALL, Esq., of counsel for complainants:

Cross-int. 6. Did you witness the execution of the instrument produced by you to-day in answer to Int. 4?

Ans. I did not.

Cross-int. 7. Have you any knowledge as to the genuineness of the signatures thereto, except that you have elsewhere seen the signatures of some of the parties?

Ans. That is the only way in which I can testify.

Cross-int. 8. Can you tell how many copies of said instrument thus executed are in existence?

Ans. I cannot.

Cross-int. 9. What leads you to testify that said instrument or paper is the original contract?

Ans. It has been in my possession since its execution, until I placed it in the hands of Sidney Bartlett, counsel of the Ogdensburg and Lake Champlain Railroad Company, to be used in suits against the Boston and Lowell and Lowell and Nashua railroads and the Northern railroad of New Hampshire. He has had

348 it about two years, I think, and I have taken it from him this morning and am to return it to him after its use here.

Cross-int. 10. Who are the attesting witnesses upon the instrument produced by you in answer to Int. 2?

Ans. E. D. Childs, as to P. Chamberlin; E. H. Church, as to John C. Pratt, president.

Cross-int. 11. Did you witness any of the signatures or do you know anything of their genuineness upon this particular piece of paper?

Ans. I was not a witness and know nothing as to these signatures upon this paper. What I mean to say is that I recognize these signatures, from their similarity to other signatures, as genuine. I know nothing as to the making of the signatures themselves.

HENRY A. CHURCH.

Attest: JOHN G. STETSON, *Examiner.*

Deposition of Josiah G. Abbott.

Direct examination by JOSEPH H. BENTON, Jr., Esq., of counsel for defendants:

BOSTON, *Sept.* 25, 1885.

Int. 1. Please state your name and if you have previously testified in this cause.

Ans. Josiah G. Abbott; I have.

Int. 2. It appears by the record of the directors of the Nashua and Lowell railroad, found on page 367 of the printed record, that on Nov. 23, 1869, you were appointed, together with Mr. Crowninshield and a manager, a committee to negotiate contracts with the Northern connecting roads, and that on Jan. 25, 1870, that committee reported to the said directors a draft for a contract, as appears by extract from the records of the directors, found on page 367 of the printed record, and were authorized to conclude a contract with the Concord, Northern and Vermont Central roads for the term of twenty years. I now show you Defendants' Exhibit 79 to deposition of C. E. A. Bartlett, purporting to be a copy of such a contract, and ask what action the committee took and what contract,

349 if any, they executed in pursuance of the authority granted by said votes?

(Objected to as incompetent and immaterial and as calling for matter of contract which must be shown by producing the contract itself, if at all.)

Ans. I cannot testify to the dates referred to from recollection, of course; but I do recollect perfectly well that at about the time of the dates referred to I was one of the committee appointed by the directors of the Nashua and Lowell railroad for the purposes inquired of in the question. I was also one of a committee appointed by the Boston and Lowell for the same purpose. We proceeded directly to the business of negotiating contracts with the Northern railroads and reported, I should say, a draft of a contract with the

Northern lines of road, being the Concord, Northern, and Vermont Central. We were authorized to sign a contract with those railroads by the directors of the Nashua and Lowell railroad, and also the Boston and Lowell; and, as one of the committee, I did sign a contract with those roads in behalf of the Nashua and Lowell railroad. I have no doubt that the exhibit referred to in the question is a true copy of the contract signed by me, because on examining this copy it seems to be the one I helped make and signed, and printed copies of the contract were made, of which the exhibit referred to is one. I had one also of the same printed copies, and it has been in my possession most of the time up to this time.

(Last part of answer objected to as inadmissible proof of a contract, the original of which should be produced.)

Int. 3. It appears by a copy of the vote of the directors of the Nashua and Lowell railroad, found on page 368 of the printed record, that on Feb. 14, 1870, said directors appointed you, Mr. Crowninshield, and the manager a committee empowered to negotiate and conclude a contract in connection with other railroad companies between Boston and Rouse's Point for the traffic of the Ogdensburg and Lake Champlain railroad. I now show you Defendants' Exhibit 80 to deposition of C. E. A. Bartlett, found on page — of the printed record, and ask whether that is a correct copy of the agreement executed by said committee?

(Same objection as to above question and answer.)

350 Ans. Of course I cannot say from recollection that the precise dates referred to are correct, but, about the time referred to, I am sure that I was appointed one of a committee by the directors of the Nashua and Lowell Railroad Company, and also one of a committee of the Boston and Lowell Railroad Company, for the purposes named in the question, and, as one of said committees, I assisted in negotiating and making a contract such as referred to in the question, and I executed such a contract as one of a committee in behalf of the Boston and Lowell railroad. I also executed a contract subsidiary to it, and really a portion of that contract, as one of a committee in behalf of the Boston and Lowell railroad, and also on behalf of the Nashua and Lowell railroad. I have no doubt the exhibit produced is a true copy of said contract. I desire to say that the subject and substance of the contract were discussed by and known to all the directors of both corporations before it was executed.

Int. 4. It appears from the record of the meeting of the directors of the Nashua and Lowell railroad held Feb. 6, 1861, found on page 369 of the printed record, that you, Mr. Crowninshield, and the manager were appointed a committee with power to execute contracts to retain the business of the Western lakes to the line. I now show you Defendants' Exhibit 82 to deposition of C. E. A. Bartlett, found on page —, purporting to be an agreement with reference to the business of the Northern Transportation Company boats, and

ask you what action was taken, if any, by said committee under said vote?

(Same objections.)

Ans. I was appointed one of a committee by the directors of the Nashua and Lowell railroad and one of a committee by the Boston and Lowell railroad for the purpose of negotiating and making such a contract as that named in the question. As one of said committees, I assisted in making and negotiating such a contract, and I executed such a contract as one of a committee in behalf of the Nashua and Lowell Railroad Corporation, and also as one of a committee in behalf of the Boston and Lowell Railroad Corporation. I have no doubt the exhibit named in the question (Exhibit 82) is a true copy of the contract executed by me, as I have been very
351 familiar with it for several years past. I can say the terms of this contract—the substance of it—were discussed by and known to all the directors of both corporations before it finally went into effect.

Int. 5. Referring to this printed copy, Exhibit 82, do you know whether it was made at or about the time the contract was executed, and was or was not acted upon by the Nashua and Lowell and Boston and Lowell roads and other parties thereto as a true copy of an original contract?

(Objected to as immaterial.)

Ans. I know copies of the contract were printed either at the time or soon after the execution of the contract, of which Exhibit 82 is one, I have no doubt. I have no doubt I have had in my possession one of said printed copies most if not all the time since it was printed, and the printed copy was usually referred to as a matter of convenience instead of the written contract. The printed copy was always used and acted upon as a correct copy of the contract. The contract was acted under and upon by both the Nashua and Lowell and the Boston and Lowell railroad corporations for more than a year—I think nearly two years—after its execution, and both corporations received all the benefits arising thereunder. It finally failed, not through any act of either corporation, but through the act of the Northern Transportation Company.

(Last part of answer objected to as irresponsive.)

Int. 6. Do you know whether at any time before the Salem and Lowell and Lowell and Lawrence railroads were controlled by the Nashua and Lowell and Boston and Lowell railroad corporations their roads were actually operated, together with the roads of the Boston and Maine Railroad Company, as a competing line to the Boston and Lowell between Lowell and Boston; and, if so, was such competition beneficial or otherwise to the Boston and Lowell and Nashua and Lowell railroads?

(Objected to as immaterial and irrelevant.)

Ans. They were so operated at that time to the very great injury

of the Boston and Lowell railroad. The competition by the said three railroads was very injurious to the Boston and Lowell railroad, in my judgment, and I believe also was very injurious to the interests of the Nashua and Lowell railroad.

352 Int. 7. Are you a member of the bar of this circuit and of the Commonwealth of Massachusetts, how long have you been in practice, and have you or not been familiar with the special and general railroad laws of the Commonwealth during that time, and especially with the special laws relating to the Boston and Lowell, Salem and Lowell, and Lowell and Lawrence railroads?

Ans. I have been in full practice in the Federal and State courts for forty years. My business has made me familiar with the general laws relating to railroads in this State, and my employment for thirty years or more as counsel for the Boston and Lowell railroad has made me familiar with all the special acts having reference to the railroad corporations inquired of.

Int. 8. Do you know whether at the time the Salem and Lowell and Lowell and Lawrence roads were leased to the Boston and Lowell railroad in October, 1858, there was any special statute authorizing such leases or any general law under which an operating contract could be made between said roads unless such contract was authorized by chapter 99 of the Laws of 1838, under which said leases were assumed to be made?

(Objected to as immaterial and an improper way of proving law.)

Ans. I recollect no special law authorizing leases referred to. I believe the leases or contracts referred to were made under and by virtue of the act of 1838, referred to in the question. I recollect of no other law on that subject at that time.

Int. 9. I now show you a paper purporting to be the original contract, a copy of which is Defendants' Exhibit 80 to deposition of C. E. A. Bartlett, with reference to which you have testified, and ask whether you know that to be the original of said contract, and whether the signatures thereto are genuine?

(Objected to for assuming that Exhibit 80 is a copy of paper produced, and as immaterial.)

Ans. The paper produced is the original contract referred to. I signed it. The signatures of Cheney, Crowninshield, Stark, Sterns, and Crocker I am very familiar with, having seen them write many times. Those signatures are genuine beyond all question. Some of them I saw written.

353 Int. 10. I now show you a paper purporting to be the original contract, of which Defendant's Exhibit 82 to deposition of C. E. A. Bartlett purports to be a copy, and ask you whether that is the original of such contract and whether the signatures thereto are genuine?

(Same objections, and plaintiffs insist that signatures shall be proved by the attesting witnesses only.)

Ans. The paper produced is the original contract. My own signatures are genuine. The signatures of John C. Pratt, Crowninshield, Stark, Choate, and Stearns are genuine beyond all question. I am familiar with all of them, having seen them write many times. I have no doubt the signature of Chamberlin is also genuine, as I have seen him write several times, and my belief and best recollection is that I saw him sign this very paper. I know I saw Mr. Crowninshield and Mr. Stark and also Mr. Stearns and Mr. Choate sign. I think I saw Mr. Pratt sign.

Cross-examination by ALFRED S. HALL, Esq., of counsel for complainants:

Cross-int. 11. Upon Defendants' Exhibit 82 referred to in the last question the fourth signature is as follows:

"TRUSTEES AND MANAGERS VT. CENTRAL
AND VT. AND CANADA RAILROADS,
By J. GREGORY SMITH. [L. S.]"

And the fifth signature is—

"J. GREGORY SMITH. }
GEORGE STARK. } [L. S.]"

Please look at the paper you produce or declare to be the original and say if either of these signatures appear thereon, and whether the purported copy is actually a copy.

Ans. These signatures do not appear upon the original paper handed to me, and, so far as those three signatures are concerned, the paper, Exhibit 82, is not a copy of that paper. How the discrepancy arose I cannot say, but I know the contract was acted upon by the Vermont and Canada railroad and by those representing it and by the trustees and managers of the Vermont Central and Ver-
354 mont and Canada railroads and by J. Gregory Smith and George Stark, trustees, until the failure of the Northern Transportation Company. I have not compared word by word the exhibit with the original, but still, having been very familiar with that contract and that printed copy, I still say I have no doubt one is a copy of the other, and at any rate the copy was acted upon as a true copy.

Cross-int. 12. Please state who are the attesting witnesses upon the purported original.

Ans. E. D. Childs to signature of Chamberlin; E. H. Church to signature of Pratt.

Cross-int. 13. Do you know whether Exhibit 80, mentioned in Int. 9, is a true copy of the paper you have testified in regard to?

Ans. Not by comparing word by word the copy with the original, but still I have no doubt, from my familiarity with the contract, that it is a true copy.

Cross-int. 14. Int. 4 refers to record of directors of Nashua and Lowell meeting of Feb. 6, 1871, which is before you. At the beginning of the record are these words: "The directors of the Boston and Lowell Railroad Company were present in joint session." Was

not the vote quoted in that interrogatory submitted to both boards of directors—*i. e.*, the Boston and Lowell and Nashua and Lowell boards—sitting together at the same time and at the same table, or jointly, and not separately as for the separate action of the two boards of directors?

Ans. I have no recollections as to the details in reference to the passage of those votes by either of the corporations. I have no doubt, from my knowledge of the general course of business of the two boards when sitting together, that the vote was put by the presiding officer to each board of directors separately.

Cross-int. 15. Was not the vote so passed by both boards presented by only one person and was not the same committee appointed to represent the joint interests of the two corporations at the same time?

Ans. I haven't the slightest recollection whether the votes were presented by one or more persons. It appears by the record that the same persons were appointed a committee for each corporation and at the same meeting.

355 Cross-int. 16. And in acting as one of such committee you acted in the joint interest of both, did you not? And did you not, under such appointment, sign an instrument dated Aug. 29, 1871, a copy of which is now shown you, the signatures to which, on the part of yourself and the other members of the committee, is in these words? "Boston and Lowell and Nashua and Lowell Railroad Corporations, by F. B. Crowninshield, George Stark, J. G. Abbott, committee."

Ans. Acting as a committtee for each of the corporations in reference to this matter, I did that which I believed honestly was for the interest of each corporation, and I believe the interests of the two corporations in reference to the matter were identical. The paper referred to in the question was signed as set forth in the question, and I had no doubts then and have none now that such signing was equally binding upon both corporations as if the committee had signed separately for each corporation.

Cross-int. 17. In your answer to Int. 2 you say that you signed a contract with the northern roads in behalf of the Nashua and Lowell road. Did you not, in same manner and at same time, sign on behalf of the Boston and Lowell railroad?

Ans. I did so sign at the same time and in the same manner in behalf of the Boston and Lowell road.

Cross-int. 18. In signing the instrument dated Aug. 29, 1871, if you were not acting under a vote passed by joint action of the two boards, as distinct from the separate action of independent corporations, is it not probable that you would have made separate signatures for each corporation?

Ans. I no not think it is. That was a memorandum between a portion of the signers of the main contract, and I should have been just as likely to have signed it in that way, whether the meeting of the directors of the corporations had been joint or separate.

J. G. ABBOTT.

Attest: JOHN G. STETSON, *Examiner.*

356 BOSTON, *Sept.* 16, 1885.

Counsel for defendants offers in evidence sects. 11 and 12 of chap. 133 of General Statutes of the State of New Hampshire relating to the general powers of corporations, which are as follows:

"SECT. 11. All accounts and minutes of business of the corporation, kept by its treasurer or by any officer or agent thereof, all records of certificates and transfers of shares, all original certificates and transfers on file, and original papers and evidences of debts due to such corporation shall be subject to the inspection of every member and stockholder and of every creditor thereof whose demand is due and unpaid so far as they have, any relation to the claim of such creditor.

SECT. 12. The clerk, treasurer, or other officer or agent of any corporation having the keeping of any such record, account, or paper, when required by any member or stockholder or by any such creditor, on payment or tender of the like fees as are by law allowed to clerks of courts for such service, shall furnish a certified copy of any vote, record, or account and of any original paper which such party is entitled to inspect."

Counsel for defendants puts in evidence sects. 1 and 2 of chap. 99 of the Laws of 1838 of the Commonwealth of Massachusetts, entitled "An act authorizing railroad corporations to make certain contracts," as follows:

"SECTION 1. Any railroad corporation which has been or may be created by this Commonwealth or by the concurrent acts of this Commonwealth and any other adjoining State is hereby authorized to contract with any other railroad corporation created as aforesaid whose road enters upon or is connected with the road of the corporation so contracting to do and perform all the transportation of persons and freight upon and over said railroad upon such terms and conditions as may be mutually agreed by the parties.

SECT. 2. Any railroad corporations which may make such contracts shall append to their next annual reports a copy of said contracts, and shall, in their annual reports of their receipts and expenditures, specify their receipts and expenditures under said contracts, and the income arising from said contracts for transportation shall be subject to the provisions of law in regard to the right of the Commonwealth to reduce the tolls on said roads or to purchase said roads in the same manner as the income arising from the use of said roads is made subject."

357 Counsel for defendants offers in evidence chap. 386 of the Acts of the Legislature of Massachusetts for the year 1855 as follows:

"*Chapter* 386, *Massachusetts Statutes of* 1855.

An act to establish an independent line of railroad communication between Boston and Lowell.

SECTION 1. The Lowell and Lawrence Railroad Company, the Salem and Lowell Railroad Company, and the Boston and Maine

railroad are hereby authorized to make arrangements between themselves for the use in common of these sections of their several railroads which lie between Lowell and Boston, to wit, that section of the Lowell and Lawrence railroad which lies between Lowell and the point of junction with the Salem and Lowell railroad in Tewksbury; that section of the Salem and Lowell railroad which lies between said last-named point and a convenient point of junction with the Boston and Maine railroad in Wilmington, and that section of the Boston and Maine railroad which lies southwardly of said last-named point; and the above-named corporations, in conformity to such arrangements, may use said sections of their several railroads or permit the same to be used for the transportation of persons and property.

SECT. 2. Any person or corporation who may sustain damage by reason of any acts done by the three corporations above named or either of them in pursuance of the authority granted by this act may have the same estimated in the manner now provided by law for the estimation of damages caused by the laying out, making, and maintaining of a railroad: but the application shall be made to the county commissioners of the county of Middlesex; and if either party, being dissatisfied with such estimate of damages, shall apply for a jury the jury shall be taken from such towns in said county as any justice of the court of common pleas shall direct, and the sheriff shall apply to some one of said justices for such direction, and it shall be the duty of said justice to name the towns from which the jury shall be taken in the manner prescribed by law.

SECT. 3. The three railroad corporations named in the first section of this act are authorized to run trains through from Lowell to Boston and from Boston to Lowell, over the three aforesaid sections of railroad, without change of cars or loss of time, for the conveyance of passengers and merchandise over any portion of the line between Boston and Lowell, and to sell tickets and to receive payment of money in their cars for the transportation of passengers as aforesaid, and to make joint tariffs for the transportation of merchandise: Provided, That this section shall not be construed to permit said corporations or either of them to transport pas-
358 sengers or freight from Boston, Charlestown, Cambridge, or Somerville to any point within five miles of the northerly terminus of the Boston and Lowell railroad or from any point within five miles of the northerly terminus of said last-named railroad to Boston, Charlestown, Cambridge, or Somerville.

SECT. 4. The first two sections of this act shall take effect when the same shall have been accepted by all the corporations therein named, but the last two sections shall take effect from and after the passage of this act."

Counsel for defendants offers in evidence chap. 161 of the Acts of the Legislature of Massachusetts for the year 1856 as follows:

"*Chapter* 161, *Massachusetts Statutes of* 1856.

An act concerning the Boston and Lowell and Salem and Lowell Railroad Companies.

Be it enacted, etc., as follows:

SECTION 1. The Salem and Lowell Railroad Company are hereby authorized to enter upon the Boston and Lowell railroad from the Lowell and Lawrence railroad at any convenient point of junction in Lowell, and may use so much of the Boston and Lowell railroad as lies north of the tract leading to the Lowell bleachery and all the branches of said last-named railroad in the city of Lowell; and said Boston and Lowell and Salem and Lowell Railroad Companies are hereby invested with all the rights, powers, and privileges of railroad corporations whose railroads are connected by law.

SECTION 2. This act shall take effect as soon after the passage thereof as the same shall have been accepted by the Boston and Lowell and Salem and Lowell Railroad Companies at meetings legally called for the purpose.

May 8, 1856."

Copies of the original leases of the Salem and Lowell and the Lowell and Lawrence Railroad Corporations to the Boston and Lowell Railroad Corporation, dated Oct. 1, 1858, are made Defendants' Exhibits 85 and 86 by agreement, and are as follows:

(The above-described papers here read are marked, respectively, "Defendants' Exhibit 85, J. G. S., ex'r," and "Defendants' Exhibit 86, J. G. S., ex'r," and printed with the other exhibits in this case.)

Counsel for defendants also puts in evidence sect. 115 of chap. 63 of the General Statutes of the Commonwealth of Massachusetts, enacted Dec. 28, 1859, as follows:

359 *General Statutes of Massachusetts, Chapter* 63, *of Railroad Corporations.*

Relations of connecting roads.

* * * * * * *

"SECTION 115. Two corporations created by this State or by the concurrent acts of this and an adjoining State, whose roads enter upon or connect with each other, may contract that either corporation shall perform all the transportation of persons and freight upon and over the road of the other. The income arising from such contracts shall be subject to the provisions of law in regard to the right of the State to purchase the roads or reduce their tolls in the same manner as that arising from the use of the roads."

railroad are hereby authorized to make arrangements between themselves for the use in common of these sections of their several railroads which lie between Lowell and Boston, to wit, that section of the Lowell and Lawrence railroad which lies between Lowell and the point of junction with the Salem and Lowell railroad in Tewksbury; that section of the Salem and Lowell railroad which lies between said last-named point and a convenient point of junction with the Boston and Maine railroad in Wilmington, and that section of the Boston and Maine railroad which lies southwardly of said last-named point; and the above-named corporations, in conformity to such arrangements, may use said sections of their several railroads or permit the same to be used for the transportation of persons and property.

SECT. 2. Any person or corporation who may sustain damage by reason of any acts done by the three corporations above named or either of them in pursuance of the authority granted by this act may have the same estimated in the manner now provided by law for the estimation of damages caused by the laying out, making, and maintaining of a railroad: but the application shall be made to the county commissioners of the county of Middlesex; and if either party, being dissatisfied with such estimate of damages, shall apply for a jury the jury shall be taken from such towns in said county as any justice of the court of common pleas shall direct, and the sheriff shall apply to some one of said justices for such direction, and it shall be the duty of said justice to name the towns from which the jury shall be taken in the manner prescribed by law.

SECT. 3. The three railroad corporations named in the first section of this act are authorized to run trains through from Lowell to Boston and from Boston to Lowell, over the three aforesaid sections of railroad, without change of cars or loss of time, for the conveyance of passengers and merchandise over any portion of the line between Boston and Lowell, and to sell tickets and to receive payment of money in their cars for the transportation of passengers as aforesaid, and to make joint tariffs for the transportation of merchandise: Provided, That this section shall not be construed to permit said corporations or either of them to transport pas-
358 sengers or freight from Boston, Charlestown, Cambridge, or Somerville to any point within five miles of the northerly terminus of the Boston and Lowell railroad or from any point within five miles of the northerly terminus of said last-named railroad to Boston, Charlestown, Cambridge, or Somerville.

SECT. 4. The first two sections of this act shall take effect when the same shall have been accepted by all the corporations therein named, but the last two sections shall take effect from and after the passage of this act."

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"*Chapter* 161, *Massachusetts Statutes of* 1856.

An act concerning the Boston and Lowell and Salem and Lowell Railroad Companies.

Be it enacted, etc., as follows:

SECTION 1. The Salem and Lowell Railroad Company are hereby authorized to enter upon the Boston and Lowell railroad from the Lowell and Lawrence railroad at any convenient point of junction in Lowell, and may use so much of the Boston and Lowell railroad as lies north of the tract leading to the Lowell bleachery and all the branches of said last-named railroad in the city of Lowell; and said Boston and Lowell and Salem and Lowell Railroad Companies are hereby invested with all the rights, powers, and privileges of railroad corporations whose railroads are connected by law.

SECTION 2. This act shall take effect as soon after the passage thereof as the same shall have been accepted by the Boston and Lowell and Salem and Lowell Railroad Companies at meetings legally called for the purpose.

May 8, 1856."

Copies of the original leases of the Salem and Lowell and the Lowell and Lawrence Railroad Corporations to the Boston and Lowell Railroad Corporation, dated Oct. 1, 1858, are made Defendants' Exhibits 85 and 86 by agreement, and are as follows:

(The above-described papers here read are marked, respectively, "Defendants' Exhibit 85, J. G. S., ex'r," and "Defendants' Exhibit 86, J. G. S., ex'r," and printed with the other exhibits in this case.)

Counsel for defendants also puts in evidence sect. 115 of chap. 63 of the General Statutes of the Commonwealth of Massachusetts, enacted Dec. 28, 1859, as follows:

359 *General Statutes of Massachusetts, Chapter* 63, *of Railroad Corporations.*

Relations of connecting roads.

* * * * * * *

"SECTION 115. Two corporations created by this State or by the concurrent acts of this and an adjoining State, whose roads enter upon or connect with each other, may contract that either corporation shall perform all the transportation of persons and freight upon and over the road of the other. The income arising from such contracts shall be subject to the provisions of law in regard to the right of the State to purchase the roads or reduce their tolls in the same manner as that arising from the use of the roads."

Counsel for defendants also puts in evidence chap. 298 of the Laws of Massachusetts for 1867 as follows:

"*Chapter* 298, *Massachusetts Statutes of* 1867.

An act relating to the leasing of railroads and contracts concerning the operating of the same.

Be it enacted, &c., as follows:

SECTION 1. Nothing contained in the one hundred and fifteenth section of the sixty-third chapter of the General Statutes shall be construed to authorize any railroad corporation to contract with any person or persons or other corporations for the operation and management of its road, or to contract to assume the management and operation of any other railroad, or to lease its own road, or take a lease of any other railroad without special authority so to do from the Legislature: Provided, That any such contract which has expired within three months or shall expire within six months from the passage of this act may be renewed for a term not exceeding one year.

SECT. 2. This act shall take effect upon its passage.

Approved May 31, 1867."

(Adjourned.)

SEPT. 22, 1885.

Counsel for defendants, referring to Defendants' Exhibits 59 and 60, put in evidence on page 277 of the printed record, requires that the said exhibits be printed.

Counsel for defendants requests counsel for complainants to produce the book of records of the directors of the complainant corporation showing the proceedings of such directors for the years 1867, 1870, and 1871, now in his custody and control.

360 Counsel for plaintiffs says that he is not able at this time to produce such records; and he further says that the records called for are for a period of time prior to the origin of the demand in suit, and are therefore not material to the issues framed in this suit; and he further says that the said records which he is now notified to produce were heretofore called for by defendants during the examination of witnesses Stark and Bailey in behalf of defendants, and were produced and used by the defendants, so far as they had any desire to use them, at that time.

Counsel for defendants here produces the following papers, with the admission of service thereon, and makes the same a part of this record:

NASHUA & LOWELL RAILROAD CORPORATION
v.
BOSTON & LOWELL RAILROAD CORPORATION. } No. 1386.

To the Nashua and Lowell Railroad Corporation and Francis A. Brooks, its president and attorney of record:

You are hereby notified to produce the books of record contain-

ing the record of the meeting of the directors of the Nashua and Lowell Railroad Corporation for the years 1867, 1870, and 1871, and especially to produce the records of the meeting of February 14th, 1870, together with the other records for the years above specified; said records to be produced before John G. Stetson, Esq., who is now taking testimony in said cause.

BOSTON & LOWELL RAILROAD CORPORATION,
By A. A. STROUT, *Its Att'y.*

A. A. STROUT,
J. H. BENTON, JR.,
Def'ts' Att'ys.

BOSTON, *Sept.* 22, 1885.

I admit service of the foregoing notice upon me this day at 4 o'clock p. m.

F. A. BROOKS,
For Plaintiffs.

SEPT. 23, 1885.

Counsel for the plaintiff corporation here gives notice to the defendants that the plaintiff has filed a motion and presented the same to the court for leave to amend its bill by striking out so
361 much thereof as relates to a claim or demand against the Boston and Lowell Railroad Company, defendants, for the difference in value, at the end of the contract (Dec. 1, 1878), of three hundred tons of new rails laid down in plaintiff's railroad track, over three hundred tons of old rails, being the item of claim referred to in the last nine lines at the bottom of page 3 of the printed bill of complaint; and that said plaintiff is of opinion that this claim is not the proper subject of a bill in equity and could not be recovered therein, and that the plaintiff has taken no evidence in this case in support of said claim and now disclaims any right of recovery thereon, and consents that it be discharged from said bill, as by his motion, now before the court, is prayed.

Counsel for defendants offers in evidence, from the book heretofore marked by the examiner, for identification, "Y, Sept. 2, 1885, J. G. S., ex'r," and referred to in the deposition of William W. Bailey, on page 279 of the printed record, and testified by said Bailey to be a true and accurate copy of the records of the directors of the Nashua and Lowell Railroad Corporation, from Sept. 22, 1858, to May 28, 1867, so far as it purports to be such copy, the following extracts, attested by the examiner as correct copies from said book, namely:

From the record of the board of said directors, on Aug. 27, 1867, the following:

"The monthly statement of accounts was read, and the manager submitted a claim of the Locks and Canals Co. of Lowell for an allowance to them of a portion of rents of the property known as the Flour Store, located on grounds taken of said company by authority

of charter; also a draft for a business contract with the Connecticut and Passumpsic Rivers railroad.

A true copy.

Attest: JOHN G. STETSON, *Examiner.*"

And the following vote from the records of the same meeting:

"Voted, That the manager and Mr. Hosford, of the Boston and Lowell board, be, and are hereby, authorized to conclude a business contract with the Connecticut and Passumpsic Rivers railroad on the general terms this day reported.

A true copy.

Attest: JOHN G. STETSON, *Examiner.*"

362 And the following vote from the record of the meeting of said directors on Nov. 23. 1869:

"Voted, That F. B. Crowninshield, J. G. Abbott, and the manager be a committee to negotiate contracts with the northern connecting roads, for the conduct of joint business, for a period of not exceeding twenty years.

A true copy.

Attest: JOHN G. STETSON, *Examiner.*"

Also the following from the records of the meeting of said directors Jan. 25, 1870:

"The committee appointed Nov. 23 last to negotiate contracts with the northern connecting roads reported a draft for a contract with the Concord, Northern and Vermont Central roads for business to, from, and beyond the Vermont Central road for a term of twenty years; and the same having been read, the said committee were by vote authorized to conclude a contract upon the general basis of the draft.

A true copy.

Attest: JOHN G. STETSON, *Examiner.*"

Also the following vote from the record of the meeting of said directors on Feb. 14, 1870:

"Voted, That Messrs. Crowninshield, Abbott, and the manager be a committee with power to negotiate and conclude a contract in connection with other railroad companies between Boston and Rouse's Point for the traffic of the Ogdensburg and Lake Champlain R. R.

A true copy.

Attest: JOHN G. STETSON, *Examiner.*"

Also the following vote from the record of the meeting of said directors Feb. 6, 1871:

"Voted, That Mr. Crowninshield, of this board; Judge Abbott, of the Boston and Lowell board, and the manager be a committee on behalf of these corporations with power to execute such contracts in connection with the other roads in the line and with the Ogdensburg and Lake Champlain Railroad Company, the Northern Trans-

portation Company, and the trustees, who may hold the property of said last-named company, as may, in their judgment, tend to promote our interests by retaining and fostering the business of the Western lakes in connection with Boston and other New England points.

A true copy.

Attest: JOHN G. STETSON, *Examiner.*"

363 (Counsel for plaintiffs objects to the extracts from the records contained in book marked "Y," offered in evidence by defendants' counsel, because the said book marked "Y" also contains in parallel columns, or purports to contain, the action taken at the same meetings by or in behalf of the directors of the Boston and Lowell Railroad Corporation, as stated by the witness Bailey in his answer to Int. 78, p. 238 of the Record; and it appears, on inspection of book "Y," that the directors of the defendant corporation, at meetings held at the same times, to wit, Nov. 23, 1869; Jan. 25, 1870; Feb. 14, 1870; Feb. 6, 1871, passed votes either in the same terms with those here offered in evidence as the votes of the plaintiff corporation's directors or in terms so similar as to show the acts of both boards of directors at the same times to have been precisely the same; or, in other words, that these votes recorded as votes of the plaintiff corporation's directors were passed at meetings held by both boards of directors at the same times on the same subject; and plaintiffs counsel, upon observing this state of facts, now offers to waive all objections to this offer of evidence by copy instead of by original record, if defendants' counsel will allow it to appear that the same or similar action was taken by the boards of directors of both plaintiff and defendant corporations at the meetings referred to, which defendants' counsel offers to prove to have been taken by the directors of the Nashua and Lowell Corporation alone, or will put in the votes of both boards of directors passed at the same meetings, at the same time time, on the same subjects.)

Counsel for defendants puts in evidence from said book copies, attested by the examiner to be correct, of the full records of said meetings, and also the full records of the meetings of the directors of the Boston and Lowell Railroad Corporation at which action was taken on the subjects covered by said votes, as follows:

BOSTON, *Aug.* 27, 1867.

The directors of the Nashua & Lowell Railroad Company met at the depot rooms in Boston at eleven o'clock in the forenoon.

The whole board was present.

The monthly statement of accounts was read and the manager submitted a claim of the Locks & Canals Company of Lowell for an allowance to them of a portion of rents of the property known as the Flour Store, located on grounds taken of said company by authority of charter; also a draft for a business contract with the Connecticut & Passumpsic Rivers railroad.

364 Voted, That Messrs. Richardson and Spalding, of this board, be a committee, with full power to adjust the claim of the Locks

& Canals in such manner as they may deem for the interest of this corporation.

Voted, That the manager and Mr. Hosford, of the Boston & Lowell board, be, and are hereby, authorized to conclude a business contract with the Connecticut & Passumpsic Rivers railroad on the general terms this day reported.

Attest: GEO. STARK, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

BOSTON, *Nov.* 23, 1869.

The directors of the Nashua and Lowell Railroad Company met at the manager's office, in Boston, on Tuesday, the twenty-third day of November, 1869, at 11 a. m.

Present: Messrs. Crownishield, Richardson, Spalding, and Sigourney.

The monthly statements were presented.

The committee upon the improvement of terminal facilities at Boston, under the act of the last Legislature, reported that an interview was had on the 8th inst. with the committee of the directors of the Eastern railroad, and that after a protracted conference, in which the Eastern company asked for a delay until after another legislative session, notice was given them of the intention of the Lowell Railroad Company to proceed to locate on land adjacent to Andover street, unless the Eastern road should signify before this date its intention to join them in the benefits of the act.

No communication has since been received from the Eastern road, and the committee recommend that the Lowell Railroad Company now proceed at once to locate upon so much of the territory embraced in the act as lies between their present lands on the northerly side of Andover street and the westerly side of Causeway street and the northerly side of Nashua street.

The report was accepted, and the Lowell Railroad board—

Voted, That Messrs. Crowninshield and Abbott be a committee, with the manager, to prepare a location and report the same for ratification at the next monthly meeting of the board.

Also voted, That the following letter of notice be signed by the manager and returned to the Eastern Railroad Company:

BOSTON, *Nov.* 23, 1869.

Geo. M. Brown, Esq., Pres. of Eastern R. R. Co.

DEAR SIR: I am instructed by the directors of the Boston and Lowell railroad to officially bring to your notice the condition
365 of affairs under the act of the last Legislature authorizing the Boston and Lowell Railroad Co. and the Eastern Railroad Co. to take land in Boston for the purpose of improving their terminal facilities.

It was the original intention of the Lowell road to apply only for authority to take land between Andover and Nashua streets, to

be occupied for the purposes of a passenger station. At your suggestion, the scope of the plan was greatly enlarged for the purpose of affording the Eastern road an opportunity to join in the enterprise, to improve and enlarge its Boston stations, and authority was asked and obtained to extend the grant from Nashua to Billerica and from Billerica to Lowell streets. The act contemplates the occupancy of any part or the whole of the territory between Andover and Lowell streets, first by the Lowell road in its own right, with authority to convey to the Eastern road such part as may not be wanted for its own purposes; or, if the parties agree so to do, the Lowell road may locate on the side next Lowell street, and thereafter the Eastern may locate on the side next Andover street. As the existing passenger station of our road lies between your station and the granted tract, it becomes essential to you to obtain it as a part of your purchase, and if we locate on Lowell street it becomes equally essential to us, as a financial measure, to sell to you our old location, as we cannot afford to hold both. In the opinion of our Co., it is really for their direct interest to retain their present location and to simply widen it under the authority of the act. Such a course would, however, effectually cut you off from access to the new territory and would not be adopted if you desire to join in the improvement.

Soon after the passage of the act I called your attention to our desire for some early action under it. We have had numerous interviews and consultations upon the subject, and have procured the appointment of special committees from our respective boards of directors. These committees met by your invitation at your office on the 8th inst. A long discussion was had, in which delay was asked for by you on the ground of negotiations pending with other parties, not in any way affecting our interests, except that if they should be successfully consummated on your part you would not wish to avail yourselves of this grant at all. On our part it was urged that we were earnestly desirous of proceeding with our improvements, not only because the wants of our passenger business already demanded them, but, after having expended great labor and care and expense and such skill as we possessed in the procuration of the act, which was only granted after a most vigorous and bitter opposition had held it in abeyance nearly all the session, we were unwilling to run the risk of its being repealed next winter on account of our inactivity under it. The conference between our com-
366 mittees consequently resulted in a formal notice, then given, that we should proceed to act in the matter at the next regular monthly directors' meeting, occurring on the 23d inst., and unless you should meantime signify your intention to occupy some part of the grant we should proceed alone in such manner as might appear to best promote our interests. No communication having been received from your committee, I have now to inform you that at the meeting of our directors held this day our committee was instructed to proceed at once to prepare for filing a new location, extending from our present grounds to Nashua street. This location will be

finally acted upon at the next meeting of the board, in December, unless modified meanwhile by some action on your part.

I am requested to renew herein assurances of our desire to treat your company in this matter with all due courtesy, and our disposition to accord the longest possible delay which may be consistent with the pressure of our situation. At the same time you are respectfully reminded that we cannot wait for your action beyond the next monthly meeting, and that if we are not previously assured that you positively intend to purchase our present station and to occupy some part of the granted territory you will have no just cause to complain of our action in locating and building upon the ground adjacent and most convenient for our purposes.

Respectfully, your ob'd't servant,

GEO. STARK,
Manager Boston & Lowell R. R.

The manager reported that the Lexington and Arlington railroad had been offered on sale to the Boston and Lowell railroad, and that in view of measures now progressing for its extension to Lowell as a rival interest, he believed it good policy to make the purchase. He also submitted in detail his report of a personal examination of the property and estimates of its value; whereupon it was—

Voted by the Lowell board that Messrs. Crowninshield and Hosford be a committee with the manager to further consider the expediency of negotiating with the Lexington and Arlington Railroad Company for the purchase of its road and franchises and equipment, with power to complete a contract, if they think best, subject to the ratification of the stockholders.

The manager reported that he had agreed with United States Post Office Department upon the terms for conveying the mails over the railroads operated by his company for four years from July 1, 1869, and it was—

367 Voted, That he be authorized to execute said contracts and to receipt from time to time for moneys falling due under the same.

Voted, That F. B. Crowninshield, J. G. Abbott, and the manager be a committee to negotiate contracts with the northern connecting roads for the conduct of joint business for a period of not exceeding twenty years.

Voted, That the president be authorized to publish notice of the intention of this company to apply at the next session of the Legislature for authority to construct a branch track from near Milk Row station to the Mystic River railroad in Charlestown.

A petition from citizens of Winchester desiring a more convenient and commodious depot at that place was presented and referred to the manager.

Voted, in view of the increased duties of the manager, That his salary be $10,000 per annum from this date, and that the expenses of his late trip to Europe be assumed and paid by the joint roads.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

A true copy.

Attest: JOHN G. STETSON, *Examiner.*

BOSTON, *Jan.* 25, 1870.

The directors of the Nashua and Lowell Railroad Company met at the manager's office, in Boston, on Tuesday, the twenty-fifth day of January, 1870, at 11 o'clock a. m.

Present: Messrs. Crowninshield, Spalding, and Sigourney.

The monthly statements were presented and reports made upon the applications to the Legislature for the Mystic River and Lexington and Arlington connection charters.

The committee appointed Nov. 23 last to negotiate contracts with the northern connecting roads reported a draft for a contract with the Concord, Northern, and Vermont Central roads for business to, from, and beyond the Vermont Central road for a term of twenty years, and, the same having been read, the said committee were by vote authorized to conclude a contract upon the general basis of the draft.

Mr. Sigourney, of this board, and Mr. Codman, of the Boston and Lowell board, were made a committee to arrange a contract between the Boston and Lowell and Nashua and Lowell roads relative to the purchase and operation of the Lexington and Arlington railroad and its extension and of the Stoneham Branch railroad.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

368 BOSTON, *Feb.* 14, 1870.

The directors of the Nashua and Lowell Railroad Company met at the manager's office, in Boston, on Tuesday, the fourteenth day of February, 1870, at eleven o'clock a. m.

Messrs. Crowninshield, Richardson, Sigourney, and Spalding were present.

The late decision of the Supreme Court in reference to payments on contracts made prior to passage of the legal-tender act being under discussion, it was—

Voted, That the manager be directed to pay the sum of $8,750, due under the lease of the Salem and Lowell railroad, to-morrow, the fifteenth inst., in gold, and that this vote shall not commit the corporation to any future action on the question of paying gold.

The manager reported a proposal for traffic arrangements with the several roads extending to Ogdensburg, and it was—

Voted, That Messrs. Crowninshield, Abbott, and the manager be a committee with power to negotiate and conclude a contract, in connection with other railroad companies between Boston and Rouse's Point, for the traffic of the Ogdensburg and Lake Champlain R. R.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

BOSTON, *Feb'y* 6, 1871.

At a meeting of the directors of the Nashua & Lowell Railroad Co. held at No. 65 Washington St., Boston, on Monday, the 6th day of Feb'y, 1871.

Messrs. Crowninshield, Spalding, Stearns, and Sigourney were present. The directors of the Boston and Lowell Railroad Co. were present in joint session.

The committee upon the purchase of the franchise of the Mystic River railroad and certain property of the Mystic River Corporation reported that they had rec'd from the said corporation a written acceptance of proposals made by said committee for the purchase of said franchise and property, the amount to be paid for the property being three hundred thousand dollars; of which am't $75,000 is to be paid down on completion of titles, and the balance to be paid in notes running from one to five years without interest. It was—

Voted to accept the report of the committee.

Upon discussion of the question of ownership of the property, exclusive of the railroad franchise, the manager recommended that the Nashua and Lowell road should join in the purchase in the same manner as they joined in the purchase of the Mill Pond wharf estate in Boston, and it was—

369 Voted, That this corporation will join the Boston & Lowell Railroad Corporation in the purchase and improvement of the wharves and flats of the Mystic River Corporation in the proportion of thirty-one per cent. to this corporation of the entire outlay.

And the treasurer is hereby authorized to pay thirty-one per cent., or twenty-three thousand two hundred and fifty dollars, towards the first payment of seventy-five thousand dollars to be made by the joint corporations upon the execution of the deeds.

In view of the need of increased capital for the investment to be made in enlarged terminal facilities—

Voted, That the manager be instructed to apply to the Legislature of Massachusetts for authority to increase the capital stock of the Nashua and Lowell railroad up to eight hundred thousand dollars.

The manager reported the condition of negotiations between the Vermont Central line and the Ogdensburg and Lake Champlain Railroad Company and the Northern Transportation Co. with reference to obtaining for the benefit of the line the control of the boats and other property of said transportation Co. and securing their more efficient and permanent operation upon the Western lakes, and it was—

Voted, That Mr. Crowninshield, of this board; Judge Abbott, of the Boston and Lowell board, and the manager be a committee on behalf of these corporations, with power to execute such contracts in connection with the other roads in the line, and with the Ogdensburg and Lake Champlain Railroad Co., the Northern Transportation Co., and the trustees who may hold the property of said last-named Co., as may, in their judgment, tend to promote our in-

terests by retaining and fostering the business of the Western lakes in connection with Boston and other New England points.

The meeting was then adjourned.

Attest: GEO. STARK, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

At a meeting of the directors of the Boston & Lowell Railroad Corporation held at the office of the president, in Boston, on Tuesday, Aug. 27, 1867, at 1½ o'c'ck p. m.

Present: Messrs. Crowninshield, Abbott, Hosford.

The manager submitted and read a statement of receipts and expenditures for July.

Voted, That the manager, Messrs. Minot, and Hosford be a committee to negotiate with the Passumpsic River R. R. Co. for the transportation of passengers and freight to and from their road.

The meeting was then dissolved.

Attest: T. P. TENNEY, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

370 At a meeting of the directors of the Boston & Lowell Railroad Corporation held at the manager's office, in Boston, on Tuesday, the twenty-third day of November, 1869, at 11 o'clock a. m.

Present: Messrs. Crowninshield, Minot, and Hosford.

The monthly statements for October were presented and read.

The committee upon the improvement of terminal facilities at Boston, under the act of the last Legislature, reported that an interview was had on the 8th inst. with the committee of the directors of the Eastern railroad, and that after a protracted conference, in which the Eastern Company asked for a delay until after another legislative session, notice was given them of the intention of this company to proceed to locate on land adjacent to Andover street unless the Eastern railroad should signify before this date its intention to join them in the benefits of the act.

No communication has since been received from the Eastern R. R. and the committee recommend that the Lowell R. R. Co. now proceed at once to locate upon so much of the territory embraced in the act as lies between their present lands on the northerly side of Andover street and the westerly side of Causeway street and the northerly side of Nashua street.

The report of the committee was accepted, whereupon—

Voted, That Messrs. Crowninshield and Abbott be a committee, with the manager, to prepare a location and report the same for ratification at the next monthly meeting of the board.

Voted, That the following letter of notice be signed by the manager and sent to the Eastern Railroad Company.

(Letter dated Boston, Nov. 23, 1869, George Stark, manager Boston and Lowell railroad, to George M. Brown, Esq., president Eastern Railroad Company, is inserted here, but it being the same

as recorded in the record of the meeting of directors of Nashua and Lowell Railroad Corporation of Nov. 23, 1869, printed pages 364 to 366, it is not here reproduced.—J. G. S., ex'r.)

The manager reported that the Lexington and Arlington railroad had been offered on sale to this road and that in measures now progressing for its extension to Lowell as a rival interest he believed it good policy to make the purchase.

He also submitted in detail his report of a personal examination of the property and estimates of its value, whereupon—

Voted, That Messrs. Crowninshield and Hosford be a committee, with the manager, to further consider the expediency of negotiating with the Lexington and Arlington Railroad Co. for the purchase of its road and franchises and equipment, with power to complete a contract, if they think best, subject to the ratification of the stockholders. The manager reported that he had agreed with the United States Post Office Department upon the terms for conveying the mails over the railroads operated by this company for four years from July 1, 1869, and it was—

371 Voted, That he be authorized to execute such contracts and to receipt from time to time for moneys falling due under the same.

Voted, That Messrs. Crowninshield, Abbott, and the manager be a committee to negotiate contracts with the northern connecting roads, for the conduct of joint business, for a period of not exceeding twenty years.

Voted, That the president be authorized to publish a notice of the intention of this company to apply at the next session of the Legislature for authority to construct a branch tract from near Milk Row station to the Mystic R. R. in Charlestown.

A petition from citizens of Winchester desiring a more convenient and commodious depot at that place was presented and referred to the manager.

Voted, in view of the increased duties of the manager, That his salary be ten thousand dollars per annum from this date, and that the expenses of his late trip to Europe be assumed and paid by the joint roads.

The meeting was then dissolved.

Attest: T. P. TENNEY, *Clerk.*

A true copy.

Attest: JOHN G. STETSON, *Examiner.*

At a meeting of the directors of the Boston and Lowell Railroad Corporation held at the manager's office, in Boston, on Tuesday, Jan. 25, 1870, at 11 o'clock a. m.

Present: Messrs. Crowninshield, Hosford, and Codman.

Mr. Hosford was chosen to preside.

The meeting then proceeded to the choice of officers for the ensuing year, whereupon the following were re-elected:

For clerk, T. P. Tenney.

" president, F. B. Crowninshield.

" treasurer, C. E. A. Bartlett.

The president elect then took the chair.

Voted, That the president and Mr. Codman be the finance committee for the current year.

Voted, That any existing committees who have not completed their duties be continued.

The manager then submitted and read a statement of receipts and expenditures for December.

A form of agreement between the Vermont Central railroad, of the first part, and the Northern, Concord, Nashua and Lowell, and the Boston and Lowell railroads, of the second part, for the conduct of the joint business of the several roads for a period of twenty years, was submitted and read by the manager, when it was—

372 Voted, That the committee upon the subject, Messrs. Crowninshield, Abbott, and the manager, be authorized to complete said contract on the part of this corporation.

Voted, That Mr. Codman, in connection with Mr. Sigourney, on the part of the Nashua and Lowell railroad board, be a committee to confer and report upon the subject of a participation by the latter road in purchases of the Lexington and Arlington and Stoneham Branch railroads.

The meeting then dissolved.

Attest: T. P. TENNEY, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

At a meeting of the directors of the Boston and Lowell Railroad Corporation held at the office of the manager, in Boston, on Monday, Feb. 14, 1870, at 11 o'clock a. m.

Present: Messrs. Crowninshield, Abbott, Minot, Codman.

Voted, That the manager be directed to pay the sum of $8,750, due under the lease to the Salem and Lowell Railroad Company on the 15th inst., in gold, and that this vote shall not commit the corporation to any furter action on the question of paying gold.

Voted, That Messrs. Crowninshield, Abbott, and the manager be a committee with power to negotiate and conclude a contract in connection with other railroad companies between Boston and Rouse's Point for the traffic of the Ogdensburg and Lake Champlain R. R.

The meeting was then dissolved.

Attest: T. P. TENNEY, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

BOSTON, *Feb.* 6, 1871.

At a special meeting of the directors of the Boston & Lowell Railroad Corporation held at rooms 65 Washington St. on Monday, Feb. 6, 1871, at 11 o'c'k a. m.

Present: Messrs. Crowninshield, Minot, Hosford, and Codman.

The committee upon the subject of purchasing wharves, lands, and flats for terminal facilities in Charlestown for Mystic River

railroad reported that they had negotiated a purchase of Mystic River Corporation amounting to $300,000, when it was—

Voted, That the Nashua and Lowell Railroad Company, at their request, be participants in the same to the extent of thirty-one per cent. of said purchase.

The plan of location of the branch railroad to connect with the Mystic River railroad with a description of same was presented, and having been accepted and signed it was—

373 Voted, That the same be filed with the clerk of the county commissioners this day.

Mr. Codman, in behalf of finance committee, reported having borrowed of Second National Bank of Boston $100,000 for five months at rate of six per cent. discount, and the treasurer had given his note therefor.

Voted, That Judge Abbott, of this board, Mr. Crowninshield, of the Nashua and Lowell railroad, and the manager be a committee on behalf of these corporations, with power to execute such contracts with the other roads in the line, and with the Ogdensburg and Lake Champlain Railroad Company, the Northern Transportation Company, and the trustees who may hold the property of said last-named company, as may, in their judgment, tend to promote our interests by retaining and fostering the business of the Western lakes in connection with Boston and other New England ports.

Voted, That, in pursuance of the authority given by the stockholders, 1,476 new shares of the capital stock of the company be issued, and that the treasurer be authorized and directed to offer the same to the stockholders of record at this date at par in the proportion of one new share for every three shares of the present stock, and that payments of the new stock be required as follows, viz:

One-fifth on the first day of April, 1871,
" " " " " Dec., 1871,
" " " " " June, 1872,
" " " " " Dec., 1872,
" " " " " July, 1873,

and that interest, at the rate of seven per cent. per annum, be allowed on each payment until July 1, 1873, when the certificates of the new shares are to be delivered.

And the treasurer is further directed to forthwith give notice in writing to each stockholder of the corporation who was such stockholder at this date of the above vote for the increase of shares of capital stock, stating in such notice the amount of the increase, the number of shares or fraction of shares of the new stock which each stockholder is entitled to take, and the times of the above payments thereof.

Voted, That the treasurer be authorized to allow any stockholder to anticipate payment and to allow on such anticipated payments six per cent. interest per annum.

Voted, To adjourn to meet at this place on Monday, 13th inst., at 11 o'clock a. m.

Attest: T. P. TENNEY, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

374 (Counsel for complainants objects to the introduction of full records of the directors of both corporations on other subjects than those covered by the votes already offered in evidence as encumbering the record, and as containing matter confessedly irrelevant and increasing thereby the expense of printing; and complainants' counsel gives notice to defendants' counsel that he may hereafter decline to bear the expense of printing so much of the evidence put in by defendants to-day and heretofore as may appear to be wholly incompetent and immaterial; and plaintiffs' counsel further says that, according to his information, full records of the meetings of Aug. 27, 1867, Nov. 23, 1869, Jan. 25, 1870, and Feb. 6, 1871, have heretofore been put in evidence by the defendants in this case once or more than once, and these records ought not to be again printed at the expense of the complainants.)

Counsel for defendants requests that the foregoing extracts be also printed with suitable reference at the close of Exhibits 78, 79, 80, 81, and 82, or that said exhibits be here printed immediately following said extracts.

Counsel for defendants requests that Defendants' Exhibit Semi-annual Statements, read by Charles E. A. Bartlett in answer to Int. 38 to him, page 297 of the printed record, be also given a number, and said exhibit is thereupon marked "Defendants' Exhibit 87, J. G. S., ex'r."

Attest: JOHN G. STETSON, *Examiner.*

375 *Further Evidence for Complainants.*

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me, John G. Stetson, examiner.

Present: Francis A. Brooks, Esq., of counsel for complainants; J. H. Benton, Jr., Esq., and A. A. Strout, Esq., of counsel for defendants.

Deposition of William W. Bailey.

Direct examination by F. A. BROOKS, Esq., of counsel for complainants:

BOSTON, *Sept.* 15, 1885.

Int. 1. State your name. You have heretofore been examined as a witness by both parties to this cause, and were present this morning during the examination of defendants' witness Bartlett, when a certain draft of contract, marked "Complainants' Exhibit Draft of Contract" and now shown you, was put in evidence. Please look at this exhibit and state whether or not it is the same referred to in

your answer to cross-int. 100, page 243, of your deposition taken by defendants in this case.

Ans. William W. Bailey. I have examined the exhibit, and I think it is the same one referred to in my said answer.

(Question and answer objected to as new matter, not in reply to defendants' case, and as immaterial, irrelevant, and incompetent.)

(No cross-examination.)

W. W. BAILEY.

Attest: JOHN G. STETSON, *Examiner.*

376 *Deposition of Charles E. A. Bartlett.*

Direct examination by FRANCIS A. BROOKS, Esq., of counsel for complainants:

BOSTON, *Sept.* 22, 1885.

(The numbering of interrogatories is continued from the last examination of this witness, page 330.)

Int. 197. In the ninety-eighth answer of your previous deposition you have stated that in the semi-annual account of the chief clerk for the six months ending April 1, 1874, the interest items on Boston improvements were entered as sums expended in payment of rents, and that these same items, or thirty-one per cent. thereof, do not appear at all in the annual reports of the directors of the Nashua and Lowell Railroad Company, unless they are embraced under the head of sums paid as and for rent. Whether or not, under these circumstances, a stockholder of the Nashua and Lowell Railroad Company would learn from those reports that any payments had been made by that corporation as and for interest upon the cost of improvements made by the Boston and Lowell Railroad Company of its real estate in Boston.

(Objected to as incompetent.)

Ans. I don't see that such stockholder could.

Int. 198. Several interrogatories were put to you by me and entered by the examiner as cross-ints. 137 to 163 in your previous deposition. As these interrogatories were objected to by defendants' counsel at the time they were put by me, among other things, as new matter not open in cross-examination, and as I did not claim they were so open in cross-examination, but supposed I was examining you as a witness for plaintiffs, I now ask you, in order to save time of repeating the same interrogatories, if you will now adopt the answers made to said interrogatories as if made by you on this present examination.

(Same objections.)

Ans. I will.

Int. 199. In your previous testimony you have spoken of holding the office of cashier of the two corporations. Whether either
377 of said corporations, plaintiff or defendant, have had such an officer as a cashier or one called by that name.

Whether or not by the term "cashier of the two corporations" you mean anything more than that the office held by you under the joint management of the two roads for the twenty years after Oct. 1, 1858, was so described in the rules adopted for the executive service. Did you hold any other office by appointment of either of the two corporations during the last years of the contract except the office of treasurer of the defendant corporation?

Ans. It was so described in the rules. I held no other office except as stated.

Int. 200. As cashier of the joint funds of the two corporations under the traffic contract, were you not under the control and direction of the manager, and not under the control and direction of either corporation?

(Objected to as calling for the opinion of the witness as a matter of law to whom he was responsible.)

Ans. I was under the control and direction of the manager. In the absence of instructions from him I looked to the two boards of directors.

Int. 201. Whether or not the sum of $6,017.69, charged by the defendant corporation to the joint roads, Oct. 1, 1871, as interest on the Salem and Lowell and Lowell and Lawrence shares, was not the first instance of any such charge made by or for the benefit of the Boston and Lowell Corporation under the joint management of the two roads.

Ans. I think it was.

Int. 202. In what form was that charge made to the joint roads under the contract, and by whom was it made, and by whose direction or authority was it made?

Ans. I can't say as to the form. It was undoubtedly made by me, by instructions from the manager.

Int. 203. Whether or not this sum was paid over to defendant company; and, if yea, how and by whom was it paid over to yourself as treasurer of the defendant corporation, or by whose authority?

378 Ans. I have no doubt it was paid over. It was paid through the accounts of the Boston and Lowell and Nashua and Lowell railroads, and probably included in the manager's drafts in settlement of the six months' accounts.

Int. 204. Whether or not the money to pay this sum of $6,017.69 was taken from the joint funds of the two roads in your hands as cashier, thirty-one per cent. of it belonging to the plaintiff corporation; if not, how otherwise?

Ans. I have no doubt it was so taken.

Int. 205. After July, 1872, were not the semi-annual accounts of the two roads for the division of the net earnings under the contract made up in the chief clerk's office by deducting the entire interest on Boston improvements, etc., from the net earnings before apportioning the same between the two roads in the ratio fixed by the contract?

Ans. I suppose they were.

Int. 206. Were not these accounts afterward settled and the amounts so found due to each party paid over by order of the manager through you as cashier?

Ans. They were.

Int. 207. Was not this the same in effect as if thirty-one per cent. of these interest items had been taken out of the Nashua and Lowell share of the net earnings under the contract and added to the Boston and Lowell share of the net earnings under same?

(Objected to as incompetent.)

Ans. It was.

Int. 208. Whether or not were the gross receipts of the two roads increased at all by the erection of the new passenger stations at Boston and Winchester, and by the purchase, at a cost of $345,684, of a majority of the stock of the Salem and Lowell and Lowell and Lawrence roads, the amount of all these expenditures by the Boston and Lowell Railroad Company being $1,566,538.37.

Ans. I don't know.

Int. 209. Whether or not the Nashua and Lowell Railroad Company, soon after being subjected to the burden of thirty-one per cent. of the interest upon these expenditures, or in 1875, stopped
379 payment of dividends to its stockholders for the first time since it was opened for business, in 1838?

(Objected to as incompetent and immaterial, and because it has already appeared that the panic of 1873 and subsequent depression of business accounted for all the disturbances in the earning capacities of the two roads.)

Ans. Dividends were stopped in 1875. Whether they ever were before I don't know.

Int. 210. Whether was the erection of the new passenger station at Boston followed by a gain or loss in the amount of receipts from the passenger business of the two roads. Before answering this question please look at the annual reports of the directors of defendant company for 1874, 1875, and 1876.

Ans. There was a general falling off of all business, passenger business as well as all other, on all roads.

Int. 211. According to these reports was not the falling off in passenger receipts—

For the first year, ending Sept. 30, 1874	$15,794 36
" second " " " 30, 1875, the further sum of	14,567 75
For the third year, ending Sept. 30, 1876, the further sum of	43,594 75

If not, how otherwise?

(Defendants' counsel objects, that the reports show for themselves, and to the witness's giving their contents, but consents to the reports being put in evidence as exhibits.)

Ans. It was.

Int. 212. Whether or not the entire reduction or falling off in receipts of the passenger business for these three years after the new station was built did not amount in all to $120,113.33.

Ans. Upon a certain basis of computation, it does amount to that sum.

Int. 213. Whether or not this basis of computation is correct.

Ans. It would take more time to consider that question than I have. I should have some doubts about it.

Int. 214. Assuming it to be true that after the completion of the new passenger station at Boston the passenger receipts fell off
380 for several years without any reduction of the fares from what they were for the year 1873, whether or not, during such decline of passenger receipts, the Nashua and Lowell Railroad Company, as entitled to thirty-one per cent. of the net passenger receipts, could have realized any pecuniary advantage from the use of the new station beyond that resulting from the use of the old station.

(Objected to as argumentative and incompetent.)

Ans. I couldn't say.

Int. 215. Whether or not the new passenger station in Boston was assessed a much higher amount, or on a much higher valuation, for taxes by the city of Boston than the old.

(Objected to as incompetent.)

Ans. The assessors' valuation of the new building was undoubtedly higher than the old; how much I don't know.

Int. 216. Have you no recollection with regard to the amount of taxes assessed on the old station or the amount of the valuation of said station for taxation in Boston?

Ans. I have not.

Int. 217. It could not have been more than the real value of the property, $500,000 or thereabouts, could it?

Ans. I have no means of judging.

Int. 218. Were not these taxes paid by you or through you as cashier?

Ans. They were.

Int. 219. What is the amount of valuation fixed on the new passenger station for the purposes of taxation by the city of Boston at the present time?

Ans. I am not positive. I think about $300,000 for the building. I don't know how much upon the land and building both.

Int. 220. Whether or not the land and building both are not valued for taxation purposes at a sum greatly above $300,000.

Ans. I have no doubt they are.

Int. 221. Have you no recollection of the amount of tax actually upon this passenger station, including land?

Ans. I have not.

Int. 222. Whether or not you recollect the fact that the taxable real estate of the defendant corporation in Boston, between
381 1873 and 1877, was increased in its valuation to the extent of $700,000 and upwards.

Ans. I have no doubt it must have been largely increased; as to the amount I don't know.

Int. 223. This increase must have been owing largely to the erection of the new passenger station, must it not?

Ans. Partly so.

Int. 224. Whether or not thirty-one per cent. of this increased taxation of the real estate of defendant corporation in Boston was taken out of the share of net earnings under the contract which would otherwise have gone to the plaintiff company.

(Objected to as incompetent and immaterial.)

Ans. It was.

Int. 225. You have referred to contracts made by the joint roads in 1867, 1870, and 1871 with other railroads and transportation companies in Vermont and New York State and on the Great Lakes. Whether or not these contracts or any of them committed the joint roads to a participation in the cost of building other roads or only to the acquisition of an interest in the traffic or business of those other roads.

(Objected to as incompetent.)

Ans. I never knew that they did.

Cross-examination by A. A. STROUT, Esq., of counsel for defendants:

Cross-int. 226. You are asked in relation to a stockholder's obtaining certain knowledge from the fact of the item of rent appearing in the accounts contained in the annual reports presented at their annual meeting. Was there any fact to prevent the stockholders of the plaintiff corporation obtaining full information as to the items making up such item of rent and ascertaining that such item was made up in part of interest paid for the use of improvements in Boston, upon inquiry in relation thereto?

Ans. I don't suppose there was.

Cross-int. 227. Whether or not such annual reports to the stockholders of the plaintiff corporation contained these gen-
382–393 eralized items of income and expenditure for the purpose of apprising said stockholders of their existence and putting them upon their inquiry as to these items, if they should see fit to make it?

(Objected to because the witness cannot know the purposes of the method of stating these accounts beyond what appears from the accounts themselves.)

Ans. Several of them which I have seen did.

Cross-int. 228. Was there or not a general falling off in the receipts of all New England terminal roads substantially the same as that which you say the reports of the defendant corporation for 1874, 1875, and 1876 show on its road?

Ans. There was; in some cases more and in some less. Following 1875 there was a most marked depression in all railroad business.

Direct examination resumed:

Int. 229. Whether or not the items of rental payments contained in the annual reports of the directors of plaintiff corporation to its stockholders are calculated, in your judgment, to lead a stockholder reading such reports to infer that any part of such payments, described as for rental, was really paid as and for interest on the cost of the real estate of the defendant corporation in Boston.

(Objected to by defendants' counsel for the reason given by Mr. Brooks in his objection to cross-int. 227.)

Ans. I don't think it was, unless he made the inquiry.

C. E. A. BARTLETT.

Attest: JOHN G. STETSON, *Examiner.*

* * * * * * *

394 COMPLAINANTS' EXHIBIT TRANSCRIPT OF RECORD No. 2. J. G. S., Ex'r.

BOSTON, *Sept.* 12, 1885.

And now comes the plaintiff corporation and files herewith with said examiner a copy of the record of the superior court for the county of Suffolk and Commonwealth of Massachusetts in the case of the Boston and Lowell Railroad Corporation against the Nashua and Lowell Railroad Corporation, in which judgment was rendered in favor of the defendant on the first day of July, A. D. 1885, the same to be used as evidence for the plaintiff in the above-entitled cause, and requests the examiner to mark the said record or a copy of record as an exhibit in said cause.

By its solicitor, F. A. BROOKS.

395 [SEAL.] COMMONWEALTH OF MASSACHUSETTS.

Whereas I, Lincoln F. Brigham, chief justice of the superior court of the Commonwealth of Massachusetts, do certify that Joseph A. Willard, Esq., whose signature is affixed to the papers hereunto annexed, is clerk of said superior court within and for the county of Suffolk and hath the keeping of the files, records, and proceedings of said court within and for said county; also of the late court of common pleas within and for said county, and of the late superior court of the county of Suffolk aforesaid; that he is by law the proper person to make out and to certify copies of the files, records, and proceedings of said several courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his attestation to the papers hereunto annexed, being numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the files, records, and proceedings of the said superior court is in due form.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty-five.

LINCOLN F. BRIGHAM,
Chief Justice of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To all to whom these presents shall come, Greeting:

Know ye that among our records of our superior court for the said county of Suffolk it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To the sheriffs of our several counties or their deputies, Greeting:

[L. S.] We command you to attach the goods or estate of the Nashua and Lowell Railroad Corporation, a body corporate duly established by law, having a place of business at Boston, in
396 said county, to the value of twenty thousand dollars, and summon the said defendants (if they may be found in your precinct) to appear before our justices of our superior court, next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of January next, then and there in our said court to answer unto the Boston and Lowell Railroad Corporation, a body corporate duly established by law, having its usual place of business at said Boston, in an action of contract. And the plaintiff says that the said Boston and Lowell Railroad Corporation and the said Nashua and Lowell Corporation, by their agreement in writing, a copy of which is hereto annexed, marked Exhibit X, referred and submitted all claims and demands of either corporation against the other which originated before the first day of October, in the year eighteen hundred and eighty, to the determination of Elias Merwin, William S. Gardner, and Waldo Colburn, Esquires, and agreed that the award of whom or of the greater part of whom should be final; and further agreed, in and by said submission, that if either of the parties aforesaid should neglect to appear before said arbitrators, after due notice of the time and place appointed for hearing the parties, the arbitrators might proceed in its absence; and they further agreed, in and by said submission, that said arbitrators might make such award respecting costs and expenses as they should judge reasonable, including a compensation for their own services; and they further agreed, in and by said submission, that they would respectively observe, obey, perform, fulfill and keep the award of said arbitrators of and concerning the premises.

And the plaintiff says that under said agreement for submission and by virtue and in pursuance thereof they submitted certain claims and demands in their behalf against the defendant, copies of which are hereto annexed, marked "Exhibit Y," and all of which originated before the first day of October, A. D. 1880, to the determination of said arbitrators. And the plaintiff says that due notice was given to the plaintiff and defendant of the times and places appointed for hearing the parties, and that the parties were present at said hearings, and represented by counsel, and that the plaintiff presented thereat its several claims and demands, copies of which

are hereto annexed, marked as aforesaid "Exhibit Y," and
397 that the said arbitrators fully heard the parties in respect thereto, and after hearing said parties and their evidence, they made an award in writing, a copy whereof is hereto annexed, marked "Exhibit Z," and the defendant was duly notified thereof.

And the plaintiff says that among the claims and demands of the plaintiff against the defendant were the following, namely:

No. 3. Thirty-one per cent. of the rental of dwelling-house at Lowell, occupied by joint agent (being the joint agent of said parties) from September 30th, A. D. 1860, to December 1st, A. D. 1879, at $500 per annum, an annual interest on the same (interest not included in this amount), twenty-six hundred and thirty-five dollars.

No. 4. Thirty-one per cent. of cost locomotive Boardman, purchased by funds of the Boston and Lowell Corporation, and interest (see vote of directors, Aug. 25, A. D. 1857, interest not included in this amount), twenty-nine hundred and forty-five dollars.

No. 9. Balance due the said Boston and Lowell Railroad Corporation from the said Nashua and Lowell Corporation for terminal charge on freight of said Nashua and Lowell Railroad Corporation during the separate operation of said railroads, from Dec. 1, A. D. 1878, to Oct. 1, A. D. 1880, eight thousand one hundred and forty-four $\frac{7}{100}$ dollars and interest, thirteen hundred and eighty-four $\frac{4}{100}$ dollars, from Oct. 1, A. D. 1880, to Aug. 1, A. D. 1883.

And the plaintiff says that at regular meetings of said arbitrators, of which the defendant had due notice, the above-named claims and demands were duly submitted and the parties were heard in respect thereto, and after such hearing the said arbitrators did make said award thereon in writing, a copy whereof is hereto annexed, marked "Z," and did therein award and determine in respect thereto as follows, viz.:

That by reason of its item of claim No. 3 the said Boston and Lowell Corporation is entitled to have and recover of said Nashua and Lowell Railroad Corporation the sum of eleven hundred and thirty-one dollars and fifty cents, and no more.

That by reason of its item of claim No. 4 the said Boston and Lowell Railroad Corporation is entitled to have and recover
398 from said Nashua and Lowell Railroad Corporation the sum of twenty-nine hundred and forty-five dollars and no more.

That by reason of its item of claim No. 9 the said Boston and Lowell Railroad Corporation is entitled to have and recover from the said Nashua and Lowell Railroad Corporation the sum of eight thousand and seventy-two dollars and thirty-eight cents, and no more; making in all the sum of twelve thousand one hundred and forty-eight dollars and eighty-eight cents, which the said arbitrators determined and awarded that the said Boston and Lowell Railroad Corporation was entitled to have and recover of said Nashau and Lowell Corporation.

And the plaintiff says that it has duly demanded of the defendant said sum of twelve thousand one hundred and forty-eight dollars and eighty-eight cents, which the defendant has neglected and refuses to pay, and the defendant owes the plaintiff the amount of said award,

being said sum and interest thereon, to the damage of the said plaintiff (as they say) the sum of twenty thousand dollars, which shall then and there be made to appear with other due damages. And have you there this writ, with your doings therein.

Witness Lincoln Flagg Brigham, Esq., at Boston, the thirteenth day of December, in the year of our Lord one thousand eight hundred and eighty-three.

JOS. A. WILLARD, *Clerk.*

On which said writ is the following return by the officer who served the same:

SUFFOLK, *ss:*

BOSTON, *Dec.* 14, 1883.

I this day attached a chip as the property of the within-named Nashua and Lowell Railroad Corporation, and gave to F. A. Brooks, president and attorney of said railroad corporation, a summons; and on the fifteenth day of said December I gave a summons, with an attested copy of this writ, to Charles B. Brooks, treasurer of said corporation, for its appearance to answer at court as within directed.

Fees:

Service and travel	$1 08
Copy	1 00
	2 08

HARUM MERRILL,
Deputy Sheriff.

399 On said first Tuesday of January, A. D. 1884, the plaintiff corporation appeared and by its attorney entered the above action, and said defendant corporation also appeared by its attorneys, and filed the following:

Superior Court. January Term, 1884.

SUFFOLK, *ss:*

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

Appearance.

In the above-entitled action please enter our appearance for the defendant.

F. A. BROOKS.
A. S. HALL.

Filed Jan. 9, 1884.

Superior Court. January Term, 1884.

SUFFOLK, *ss:*

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

Answer of Defendant.

And now the Nashua and Lowell Railroad Corporation, for answer to the plaintiff's declaration, says it admits it did, on or about the thirtieth day of September, 1882, enter into an agreement with the plaintiff for the submission to arbitration of certain claims of each party against the other, similar in terms to those set forth in the paper annexed to plaintiff's declaration marked "Exhibit X," and purporting to be a copy of said agreement of submission.

And the defendant admits that the items of plaintiff's claim numbered 3 and 4, respectively, in the declaration were em-
400 braced in the agreement of submission; and it denies that the claim mentioned in the plaintiff's declaration as No. 9 was embraced in said submission, or that the defendant ever agreed to submit the said claim to arbitration or ever did so submit it to arbitration; and as to all three of plaintiff's said claims referred to as Nos. 3, 4, and 9, respectively, the defendant says that before the same were taken up for consideration by the referees, and before any hearing thereon was had, viz., on the thirtieth day of July, A. D. 1883, this defendant revoked the said agreement of submission by an instrument in writing for that purpose, duly notified to and served upon said arbitrators, and that thereupon they ceased to have any authority or power to bind the defendant or to act further in any way under the said submission, and that the defendant is not bound by what was subsequently done by said arbitrators.

And the defendant further says, in regard to the items of the plaintiff's claim numbered 9, that no such claim was included in said submission or presented or made known to the referees or to the defendant as existing until the first day of August, A. D. 1883, after the revocation of said submission by the defendant, and after the defendant had withdrawn its attendance before the said arbitrators, and had ceased to be bound by the said submission or any proceedings subsequently had under the same; and the defendant denies that it owes the plaintiff the amount of said alleged award or any part thereof, and, except as herein expressly admitted, the defendant denies each and every allegation and item in the plaintiff's declaration contained.

NASHUA AND LOWELL RAILROAD CORPORATION,
By its attorney, A. S. HALL.

Filed Jan. 17, 1884.

401 Superior Court. January Term, 1884.

SUFFOLK, *ss:*

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

Defendant's Declaration in Set-Off.

And the defendant says that in the year 1857 it entered into a contract in writing with the plaintiff for the operation of the railroads of both corporations for the joint account and benefit of both corporations for a term of years, and that in the year 1858 the said contract was extended for a term of twenty years from and after Oct. 1, 1858, and that on or about the twenty-fifth day of August, 1857, it was agreed by the plaintiff, in consideration of the existence of said joint-traffic or pooling contract and of the fact that the track of the defendant's railroad was in better condition than that of the plaintiff corporation and would consequently require much less outlay thereon during the term of said contract, that it would, at the expiration of said contract, pay over or account to the defendant for a sum equal to the difference in value between three hundred (300) tons of new rails laid down in said track and a like quantity of old rails lying in said track, meaning thereby that it would pay to said defendant corporation a sum equal to the cost of replacing three hundred tons of old rails with three hundred tons of new rails in the track of the defendant corporation's railroad; and the defendant says that the said joint-traffic contract expired on or about Dec. 1, 1878, and that the cost of replacing said old rails with new, laid down at that time, after deducting the value of the old rails, was the sum of $9,711.87, and that the defendant then requested the plaintiff to make such payment, but the plaintiff refused and still refuses so to do, and the plaintiff owes the defendant the said sum of $9,711.87 and interest thereon since Dec. 1, 1878.

And the defendant also says the plaintiff owes the defendant the sum of seventy dollars, according to the account hereto annexed.

402 *Account Annexed.*

No. 1. To amount of fee of N. H. railroad commissioners for the year 1881, assumed by plaintiff as lessee and paid by defendant ---------- $35 00

By its attorney, A. S. HALL.

Filed Jan. 17, 1884.

And said plaintiff corporation, by its attorney, filed the following:

Superior Court. January Term, 1884.

SUFFOLK, *ss:*

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

Plaintiff's Answer to Defendant's Declaration in Set-Off.

And now plaintiff comes and denies each and every allegation contained in defendant's declaration in set-off.

And plaintiff, further answering, says that if defendant shall prove the allegations therein contained —. The plaintiff says that the parties, by their agreement in writing, a copy whereof is hereby annexed to the declaration of the plaintiff, marked "No. 1," referred the matters therein mentioned and the claims and demands contained in the defendant's declaration in set-off to arbitrators, and the arbitrators have made an award thereon in writing, a copy whereof is hereto annexed to the declaration of the plaintiff, marked "No. 2," and therein and thereby did determine that the defendant was not entitled to receive any sum from the plaintiff by reason of any of said claims and demands which are made or contained in said declaration in set-off. Wherefore the plaintiff says that it does not owe the defendant the sums claimed in and by said declaration or any part thereof.

D. S. & G. F. RICHARDSON,
Plaintiff's Attorneys.

Filed Feb. 1, 1884.

403 For account annexed see declaration of the plaintiff.

And thence the same was continued to the April term, 1884, when the plaintiff corporation, by its attorneys, filed the following;

Superior Court. April Term, 1884.

SUFFOLK, *ss:*

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

In the above case please enter an appearance for the plaintiff.

JOHN H. GEORGE.
G. A. A. PEVEY.

Filed April 1, 1884.

And said defendant corporation, by its attorneys, filed the following:

Superior Court. April Term, 1884.

SUFFOLK, *ss:*

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

And now comes the defendant and moves the court for leave to withdraw its declaration in set-off and the matter therein contained.

By its attorney, A. S. HALL.

Filed May 7, 1884.

Which said motion, after a hearing, was allowed; and after a full hearing it was ordered by the court as follows, to wit:

Superior Court. April Term, 1884.

SUFFOLK, *ss:*

The Boston and Lowell Railroad Corporation, plaintiff.
The Nashua and Lowell Railroad Corporation, defendant.

In the above action, jury trial being waived, I find for the defendant.

ALBERT MASON,
Justice Superior Court.

Finding, May 12, 1884.

404 Whereupon the said plaintiff corporation, by its attorneys, alleged exceptions to the ruling of the court in matters of law, and thence the same was continued by order of court to the July term, 1884, when said exceptions, being reduced to writing, were presented to the court. Thereupon, on motion of said defendant, said exceptions were stayed, and said defendant filed the following:

Superior Court. October Term, 1884.

SUFFOLK, *ss:*

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

Defendant's Motion for Judgment.

And now the above-entitled cause having been tried at the last April term of this court without a jury, and a finding having been made for the defendant, and exceptions to such finding having been taken and filed by the plaintiff at said April term, and the court having failed to sign or allow the same, the defendant comes and moves that judgment be entered on said finding.

By its attorney, A. S. HALL.

After a hearing said exceptions were allowed and signed by the presiding judge, and are as follows:

Superior Court. April Term, 1884.

SUFFOLK, *ss*:

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

Plaintiff's Exceptions.

This is an action of contract to recover the amount of an award made in favor of the plaintiff and against the defendant, a copy of which is set forth in the plaintiff's declaration. The pleadings are made part hereof.

405 It appeared in evidence and was not in dispute that the award purported to be made under the submission, a copy of which is made a part of the award, and that said award was signed and published by the arbitrators, as shown by the award itself; and it was proved or admitted that the several papers annexed to the award and marked respectively Exhibits "A," "B," "C," "D," "E," "F," "I," "Y," were actually laid before the arbitrators and were the subject of action by them, as set forth in the award, and that the plaintiff's specification of claims against the defendant was amended by adding thereto item No. 9, as set forth in the award.

On the part of the defendant it was proved or admitted that the arbitrators were severally served, on the 30th and 31st days of July, 1883, with notice of a revocation by the defendant of the submission, as shown in paper marked "Exhibit C," annexed to said award.

The defendant also proved that it sent to the president of the plaintiff corporation, on or about the 28th of July, 1883, the letter, a copy of which is hereto annexed, marked "Defendant's Exhibit 1," and that defendant received in reply thereto the letter, a copy of which is hereto annexed, marked "Defendant's Exhibit 2."

There was contradictory evidence whether the statement of the arbitrators contained in the last seven lines of page 1 of the printed award was correct, the defendant insisting that such statement was not correct and the plaintiff insisting that it was correct. The other facts stated in the award were not in dispute.

On the point, namely, the correctness of the statements by the referees as to the agreement of the parties, as stated at the bottom of page 1 on the printed copy of the award, viz., several of the claims made by the Nashua and Lowell Railroad Corporation against the Boston and Lowell Railroad Corporation were, by consent of both parties, submitted to the referees for their award and determination, with the understanding and reservation that the remaining claims made by the respective parties were to remain open, either for adjustment of the parties themselves or for future hearing and determination by the referees. The defendant took the ground that the only assent given by it was to the determination of the referees,

in the first instance, of certain questions of law as preliminary, and that they might pass upon such legal questions and announce
406 the result before proceeding to consider other claims embraced in the submission and before passing upon such other claims, and that defendant never consented to any partial and final award being made so as to be binding on the defendant before the revocation was notified to the referees.

The plaintiff contended that statement was true.

Thereupon the defendant contended and requested the court to rule as follows: That—

1. The clause in the submission stating that it was entered into
Refused. { "upon the understanding that said arbitrators shall be governed in their determination and award by the rules of law applicable to the case" operated as a limitation or restriction of the power of the arbitrators, so that their determination of matters of law was not final.

2. That if the arbitrators treated the submission as making them final judges of all questions of law raised before them, and undertook
Refused. { to pass finally upon all matters of law laid before them, and did so in such a way that the defendant was deprived of all means of revising their legal rulings, except by revoking the said submission, for that reason, then, such revocation was legally justifiable.

3. That, whether the defendant's revocation of the submission in
Given. { this case was legally justifiable or not, it operated to deprive the arbitrators of all further powers of action under the same.

The court was asked by the plaintiff to rule, whatever it might find upon the questions of fact in dispute, that the plaintiff was entitled to a finding in its favor for the amount of the award and interest on the same.*

The court refused to give the first two rulings prayed for by the defendant, but did give the third ruling so prayed for, and thereupon found for the defendant.

To the ruling of the court in favor of the defendant and the refusal to rule as requested by the plaintiff, and to the finding in favor of the defendant upon such ruling, the plaintiff respectfully excepts and prays that these its exceptions may be allowed.

JOHN H. GEORGE,
Plaintiff's Attorney.

* But the court declined so to rule.

Examined and allowed.

ALBERT MASON, *J. S. C.*

407 (Copy.)

DEFENDANT'S EXHIBIT 1.

BOSTON, *July 28th*, 1883.

Hon. J. G. Abbott, presid't of Boston & Lowell R. Co.

DEAR SIR: I herewith transmit to you a vote passed by the directors of the Nashua & Lowell R. Co. at a meeting held July 5th.

Permit me to say that this vote of the directors was passed with some reluctance, and as the only alternative left them for avoiding the consequences of a construction by the referees of the submission different from that which was intended by them.

Before the referees had declined to furnish us with the grounds of their rulings on the question of estoppel (raised by your counsel) we offered to go on with the hearing if permitted to withdraw from the submission our entire 5th claim and a portion (about one-fifth) of our 6th claim. This offer was declined by your counsel.

When the referees subsequently informed us that, as they understood the submission, we were not entitled to know on what legal grounds they had proceeded, and inferentially that we would not any more be entitled to know the legal grounds on which they might hereafter proceed in the determination of our other claims and of your entire claims (not yet considered by them at all), amounting to upwards of $350,000, it became manifest to us either that we had failed in drawing the submission so as to express our intention of limiting any decision made under it to the strict rules of law, or that we were not going to realize what we expected in that respect.

It seems to us obvious that the referees do not attach the same meaning to the submission as we do, or did when we entered into it, and that we must either permit the referees to determine for us the meaning of the submission in this respect (contrary to our understanding of it) or else refuse to proceed any further under what we consider an erroneous interpretation of the intention of the submission. We cannot willingly yield to the opinion of the referees that this submission confers absolute power on them.

408 (We make statement of our intention and our understanding of the meaning of the submission at the time of entering into it with much confidence, because of the fact that before entering into the submission we consulted eminent counsel as to the expediency and safety of doing so, and were advised not to do so unless special provision was made to secure an award founded upon the rules of law, and the submission was supposed by us to have been drawn so as to conform to the advice we had received in this respect.)

After the hearing before the referees had begun a preliminary question was raised by your counsel to the effect that the Nashua & Lowell Co. had become estopped as to the greater part of its claims (the 5th and 6th) by its own previous action. The estoppel so relied upon was supposed by us to consist of the directors' vote of July 23, 1872, and of nothing else. Under this impression, when the referees, after reserving this question for a time, signified to us their opinion that we could not maintain the 5th and 6th claims nor either of them without indicating any reasons, we asked them to revise such opinion and to consider that our 5th claim was not within the vote of July 23, 1872, or affected by such vote. They refused, however, either to reconsider or to hear further from us on this point, and by so doing gave us to understand that they had

found the estoppel to consist of something besides the vote of July, 1872; and yet we are not able ourselves to find anything in the evidence except that vote out of which an estoppel could be constructed, and we are not permitted by the referees to know of what material, legal or otherwise, they have found it to consist.

Under these circumstances a proper regard to our own protection seems to us to justify, if it does not require, that we should halt where we are and refuse to proceed further under the submission unless we can do so without sacrificing those portions of our claims, for the eventual rejection of which by the referees we can see no legal grounds, and as to which they refuse to make known the reasons operating upon their minds, and by so doing render it impossible for us to obtain any revision by the courts of law, however erroneous such opinions of the referees might appear to us to be.

These considerations have led the directors of the Nashua
409 and Lowell Company to adopt unanimously the vote, a copy of which is transmitted herewith.

We cannot hope that the referees will make the special report of law and facts referred to in the vote, as they have once declined to do this at our request; but we do hope that you will consent to the proposed amendment of the submission.

Before asking you to do this we have paid in full all those claims made by the B. & L. R. R. Co. against the Nash. & L. R. Co. and embraced in the submission, which are recognized by us as well founded, and we now offer in any event of this application to you to enter into a new submission, comprising all your claims against us, in precisely the language and terms of the old submission, and to proceed with the hearing of those claims alone before the referees on the first day of August next, if you so desire, in order that you may suffer no prejudice, so far as your claims against us are concerned, from the course we have determined to adopt in regard to our claims against you.

Whether you accede to our request in regard to the proposed amendment or not we are willing and shall ourselves offer to pay the referees for all services rendered by them to this time and relieve you therefrom. We enclose such draft of instrument as, if signed by your company, will be satisfactory to us in this respect.

Be good enough to reply to this at your earliest convenience, not later than the 30th inst.

(Signed) For THE NASHUA AND LOWELL R. R. CO.,
F. A. BROOKS, *Pres't and Att'y.*

(Copy.)

DEFENDANT'S EXHIBIT 2.

28 STATE STREET, BOSTON, *30th of July*, 1883.

F. A. Brooks, Esq., pres't of Nash. & Low. R. R. Co.

DEAR SIR: Your communication of the 28th inst., with its inclosures, was duly received.

410 In answer, I have this only to say: The arbitrators chosen and agreed upon by the Nashua & Lowell R. R. Co. and the Boston and Lowell R. R. Co. to pass upon and determine the difference between the two corporations have appointed the first day of August next to go on with the hearing of those matters submitted to them they have not yet heard.

Both the parties have been duly notified of the time so appointed.

The Boston and Lowell R. R. Co. will be ready at the time so appointed to go on with the hearing, and will insist that the arbitrators shall then hear and determine all matters submitted to them as speedily as possible.

Very truly, y'r ob't sert, J. G. ABBOTT,
Pres't of the B. & L. R. R. Co.

Your communication will, of course, be laid before the directors of the Boston and Lowell Railroad Company at their next meeting.

And the questions of law thereby raised, to wit, by said bill of exceptions passed to the supreme judicial court for the Commonwealth for revision; and thence the action was continued in this court from term to term to the present April term, 1885; and now a rescript is sent from said supreme judicial court for the Commonwealth as follows:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, January Term, 1885.

In the case of—

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

pending in the superior court for the county of Suffolk, ordered that the clerk of said court in said county make the following
411 entry under said case in the docket of said court, viz., "Exceptions overruled."

By the court:

GEO. W. NICHOLS, *Clerk.*

June 22, 1885.

Brief statement of the grounds and reasons of the decision.
The ruling was right.
See opinion on file with the reporter.
Filed June 22, 1885.

It is therefore considered by the court on the first day of July, 1885, that said Nashua and Lowell Railroad Corporation recover of said Boston and Lowell Corporation its costs of suit, taxed at forty-eight dollars and fifty-three cents.

All and singular, which premises we have held good by the tenor of these presents, to be exemplified.

In testimony whereof we have caused the seal of our said superior court to be hereto affixed.

Witness Lincoln Flagg Brigham, Esq., chief justice of our said superior court, at Boston, in said county of Suffolk, this fifth day of August, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] JOS. A. WILLARD, *Clerk.*

EXHIBIT Z.

Award.

(This paper is the same as Exhibit F, annexed to the answer of the Boston and Lowell Railroad Corporation and printed on pages 54 to 71, inclusive, of this record, and therefore is not reprinted here.
JOHN G. STETSON, *Clerk.*)

412 EXHIBIT X.

(This paper is the same as a part of Exhibit E, annexed to the answer of the Boston and Lowell Railroad Corporation and printed on pages 47 to 52, commencing with the beginning of 8 and Exhibit E, on page 47, and ending with the words "railroads, and of Phillips' wharf, at Salem," on said page 52, and therefore is not reprinted here.
JOHN G. STETSON, *Clerk.*)

EXHIBIT G.

(This paper is the same as "Claims of the B. & L. R'd *v.* The N. & L. R'd" and "Boston & Lowell R. R. Co.'s Claim," printed on pages 52 to 54 of this record, and therefore is not reprinted here.
JOHN G. STETSON, *Clerk.*)

Opinion of the Court Referred to in the Preceding Copy of Record.

COMMONWEALTH OF MASSACHUSETTS,
BOSTON, *Sept.* 12, 1885.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Boston and Lowell Railroad Corporation *v.* Nashua and Lowell Railroad Corporation, decided on the twenty-second day of June, 1885, on a bill of exceptions, a copy of which is hereto annexed.

JOHN LATHROP,
Reporter of Decisions.

413 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court. March Law Term, 1885.

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

Opinion of the Court.

FIELD, *J.:*

The parties submitted certain specified claims made by each against the other to the determination of three persons. One of the provisions of the submission was that the award of the arbitrators or of the greater part of them should be final, "and if either party neglects to appear before the arbitrators after the notice of the time and place appointed for hearing the parties the arbitrators may proceed in its absence," etc. The award was in writing and was signed by the arbitrators Aug. 7, 1883. Before this award was signed the defendant delivered to the arbitrators papers, copies of which are annexed to the exceptions. The papers marked C and D, as we construe them, were an unconditional revocation by the defendant of the authority of the arbitrators to proceed under the submission. The exceptions state that "there was contradictory evidence whether the statement of the arbitrators contained in the last seven lines of page one of the printed award was correct, the defendant insisting that such statement was not correct and the plaintiff that it was correct. The other facts stated in the award were not in dispute."

In reference to this statement, the correctness of which was in dispute, the defendant contended "that the only assent given by it was to the determination by the referees in the first instance of certain questions of law as preliminary, and that they might pass upon such legal questions and announce the result before proceeding to consider other claims embraced in the submission and before passing upon such other claims, and that defendant never as-
414 sented to any partial and final award being made so as to be binding on the defendant before the revocation was notified to the referees." "The plaintiff contended that that statement was true." It does not appear that the court found as a fact that this statement contained in the award either was or was not a true statement. The statement is as follows: "Several of the claims made by the Nashua and Lowell Railroad Corporation against the Boston and Lowell Railroad Corporation were, by consent of both parties, submitted to the referees for their award and determination, with the understanding and reservation that the remaining claims made by the respective parties were to remain open, either for adjustment by the parties themselves or for further hearing and determination by the referees." The award then proceeds as follows: "The items submitted to the referees, and upon which they have been requested

to pass, are those numbered 3, 4, 5, and 6, in Exhibit 1, annexed to the agreement of reference. The referees have considered these items and are of the opinion, and so award and determine, that the Nashua & Lowell Railroad Corporation is not entitled to recover anything from the Boston & Lowell railroad in respect to either of said items."

The hearing of any other claims was then, by agreement of the parties, postponed to June 29, 1883. Upon June 29 the parties met, and the defendant presented a motion for a rehearing "as to the law involved in the fifth claim and in so much of the sixth claim as has arisen or accrued since the vote of the directors passed June 25, 1877; and if upon such rehearing the views of the referees in said matters of law shall remain unchanged, then your petitioner prays that they will make in writing such a report of the facts found by them and of their rulings upon the legal questions raised by your petitioner as will enable your petitioner to save and not lose the benefit of the provision in said submission, which requires said referees to be governed by the rules of law applicable to the case." The provision in the submission thus referred to was that the claims were submitted to arbitrators "upon the understanding that said arbitrators shall be governed in their determination and award by the rules of law applicable to the case, but without prejudice from any defence based on the statute of
415 limitations, unless such defence would be good and valid in law if pleaded" to a bill in equity which had been brought by the defendant. The motion for a rehearing was overruled, and, with the consent of both parties, the further hearing under said submission was adjourned to Aug. 1, 1883. Before the hearing on Aug. 1, 1883, was begun, the papers, which we have held constitute an unconditional revocation, were delivered to the arbitrators.

The arbitrators were of opinion "that they were bound to proceed with the hearing if either party so desired, and so informed the parties, and that they were ready to hear them." The defendant, by its counsel, stated that "it did not intend to appear further, and did not desire notice of any adjournments, and then withdrew." The arbitrators proceeded with the hearing of claims made by the plaintiff against the defendant, and made an award in favor of the plaintiff, on which this action is brought. The court ruled, as requested by the defendant, "that whether the defendant's revocation of the submission in this case was legally justifiable or not, it operated to deprive the arbitrators of all further power of action under the same," and refused to rule, as requested by the plaintiff, that "whatever it might find upon the question of fact in dispute, the plaintiff was entitled to a finding in its favor for the amount of the award and interest on the same." The court found for the defendant, and the plaintiff excepted to the ruling, to the refusal to rule, and to the finding.

A submission to arbitration is a power which may be revoked at any time before it is executed by the publication of the award.

Wallis *v.* Carpenter, 13 Allen, 24; Marsh *v.* Butteel, 5 B. & Ald., 507; Mills *v.* Bailey, 2 H. & C., 36.

The contention is that the submission was partially executed by an award; that the defendant was not entitled to recover anything from the plaintiff in respect to the items which have been mentioned. It does not appear that this was a separate award actually reduced to writing and signed by the arbitrators. The unavoidable inference is that this conclusion was announced to the parties as the determination of the arbitrators upon these items, and that the meeting of the arbitrators was adjourned for the purpose of subsequently
416 hearing and determining the other claims of the parties, unless, meanwhile, the parties settled them. An award must cover all the claims submitted and presented to the arbitrators, and must be mutual, certain, and final. If we assume that the oral announcement of the arbitrators of their determination upon these items was intended to be their final award on these items, the award would be bad unless the parties had agreed that these items should be the subject of a separate award, because this award did not decide all the substantial matters submitted and presented. Randall *v.* Randall, 7 East, 81; *In re* Robinson *v.* Railson, 1 B. & Ald., 723; Stone *v.* Phillips, 4 Bing., N. C., 37; Blear *v.* Harrodine, 7 Exch., 269.

It has not been found as a fact that the parties agreed that these items should be the subject of a separate award. If this fact were found it would perhaps show that the parties, by their subsequent agreement, entered into two separate submissions instead of one; but then the making and publishing of an award under one submission would not be a part execution of the power conferred by the other.

But if it be assumed that the statement in the award is true, we are of opinion that the award itself does not show that the announcement of the determination of the arbitrators upon the items mentioned was intended by them as the making and publication of an award. The award, as it was finally made and published, is one and entire. The power of the arbitrators over all the matters submitted, if there had been no revocation, would have continued until the award was finally made and published. Before this was done it was competent for them to have changed their minds upon these items, to have reheard the parties and revised their decision. The announcement was interlocutory and not final. It is therefore unnecessary to consider whether any partial award, made and published under a submission such as this is, would preclude a party from revoking the authority of the arbitrators to proceed under the submission to consider and determine the remainder of the matters submitted.

Exceptions overruled.

417 Superior Court.

SUFFOLK, *ss:*

BOSTON AND LOWELL RAILROAD CORPORATION
v.
NASHUA AND LOWELL RAILROAD CORPORATION.

Plaintiff's Exceptions.

(This paper is the same as plaintiff's exceptions, with exhibits thereto annexed, a part of this exhibit, printed on pages 404 to 412, inclusive, of this record, and therefore is not reprinted here.
JOHN G. STETSON, *Clerk.*)

COMPLAINANTS' EXHIBIT DRAFT OF CONTRACT. J. G. S., Ex'r.

(Put in evidence, page 321.)

This agreement, made this — day of ——, in the year one thousand eight hundred and seventy-five, by and between the Boston and Lowell Railroad Corporation, party of the first part, and the Nashua and Lowell Railroad Corporation, party of the second part, witnesseth:

Whereas said parties, by virtue of a business contract dated Jan. 29, 1857, agreed and provided for the joint operation and management of their said railroads, with an agreement for the division of the net income thereof in the proportion of sixty-nine per cent. to the first party and thirty-one per cent. to the second party; and whereas, during the continuance and since the execution of said business contract, and with the approval and consent and for the mutual benefit and use of the parties hereto, the said second party has rebuilt and enlarged the freight station, obtained additional land, remodelled the tracks, laid additional side tracks, and made other improvements at its freight station on Western avenue, in Lowell; and whereas, during the continuance and since the execu-

of said business contract, and with the approval and consent
418 and for the mutual benefit and use of the parties hereto, the said first party has obtained additional land and rebuilt and enlarged its passenger station in Boston, and enlarged and rebuilt the bridge and other approaches connected therewith; and also obtained additional land and built a new passenger station and improved its freight and passenger facilities at Winchester; and has also, through the intervention of trustees, invested $345,674 in the capital stock of the Salem and Lowell and Lowell and Lawrence railroads; and has also constructed a branch railroad in the town of Wilmington, to connect its main line with the Salem and Lowell railroad; and has also constructed the Mystic Branch railroad, extending from the main line of the Boston and Lowell railroad near Milk Row station to the wharf below Chelsea bridge; and has also

entered into a contract of lease with the Phillips Wharf Corporation, dated Feb. 20, 1872, for all the Phillips Wharf estate, situated in Salem, in the county of Essex, and for other property in said contract described, it is hereby mutually agreed that in the current settlements under said business contract dated as aforesaid, and during the continuance of the same, the first party will assume and account for sixty-nine per cent. of the interest incurred on the cost of each and all of said improvements, enlargements, alterations, constructions and leases, and of the current expenses and liabilities incident to the same, and shall be entitled to sixty-nine per cent. of the rents, benefits, and profits incident thereto, and the second party will assume and account for thirty-one per cent. of the interest incurred on the cost of each and all of said improvements, enlargements, alterations, constructions and leases, and of the current expenses and liabilities incident to the same, and shall be entitled to thirty-one per cent. of the benefits and profits incident thereto, it being understood and agreed that the cost of the enlargements and improvements, investments and leases aforesaid shall be fixed as follows:

At Lowell, at	$102,186 24
Of the Mystic River Branch, at	229,881 91
Of the passenger station and bridge and other approaches at Boston, at	1,200,854 37
Of the improvements at Winchester, at	20,000 00
Of the Phillips wharf, at rent per annum	23,000 00
419 Of the Salem and Lowell and Lowell and Lawrence investments, at	345,674 00
Of the Lawrence Branch, at	50,000 00

And whereas, during the continuance and since the execution of said business contracts, dated as aforesaid, with the approval and consent and for the mutual benefit of the parties hereto, the lease of the Wilton railroad of New Hampshire has been modified, renewed, and extended, and the lease of the Stony Brook railroad of Massachusetts has been modified and extended by agreement with said second party, and the lease of the Middlesex Central railroad of Massachusetts has been made and executed and subsequently modified by agreement with said first party, and a contract of lease of the Peterborough railroad of New Hampshire has been made and executed by agreement with second party:

Now, with the view of affording greater facilities to the public, of facilitating settlements and fixing terms of connection, it is mutually agreed as follows:

1st. That said Wilton, Stony Brook, Middlesex Central, and Peterborough railroads, during the continuance of the business contract between the parties hereto, dated Jan. 29, 1857, as aforesaid, shall be operated and managed in a prudent and judicious manner, so as to maintain and, if possible, to increase their efficiency as business connections and feeders of the roads of these parties respectively.

2d. That during the continuance of the business contract dated Jan. 29, 1857, as aforesaid, each party shall have an equal voice and control in the management of said railroads leased as aforesaid, and that during the continuance of said business contracts the first party shall have an interest and ownership in the income and advantages derived from said leased railroads under said contract of lease to the extent of sixty-nine per cent. of the same, and that during the continuance of said business contract the second party shall have an interest and ownership in the income and advantages derived from said leased railroads under said contracts of lease to the extent of thirty-one per cent. of the same; and each party hereto agrees to and with the other that during the continuance of
420 said business contract it will incur, assume, and pay the responsibilities, liabilities, and expenses to be incurred, assumed, and paid under said contract of lease in the proportion of sixty-nine per cent. to the first party and thirty-one per cent. to the second party.

COMPLAINANTS' EXHIBIT LOVERING 43D ANNUAL REPORT OF PLAINTIFFS' DIRECTORS. J. G. S., Ex'r.

(Put in evidence, page 254.)

Report for the Year Ending May 29, 1878.

To the stockholders of the Nashua and Lowell Railroad Corporation:

It is now over twenty years since the Nashua & Lowell Corporation parted with the immediate control of its railroad and the collection of its earnings and united with the Boston & Lowell R. R. Corporation in placing the roads of both corporations in the hands of one managing agent, to be operated by him for the joint account of both parties, under a contract for that purpose, which assigned 31 per cent. of the earnings to the Nashua & Lowell Co. and 69 per cent. to the Boston & Lowell Co.

This contract will expire by its own limitation on the first day of October next. In view of this prospective change some action on your part will become necessary before another annual meeting. Hence it seems to us proper to lay before you with some detail such facts as have come to our knowledge respecting your present situation and loss of income and the occasion of it, and also to make known to you some views which we entertain respecting the policy of this company in future.

The Nashua & Lowell railroad was operated separately by its own officers for many years, until 1857, and during all that time it earned and paid regular semi-annual dividends, averaging $8\frac{32}{100}$ per cent. per annum against an average on the Boston & Lowell railroad for same time of $7\frac{1}{10}$ per cent. per annum.

For the eighteen years next succeeding the adoption of the joint contract of January, 1857, the regular dividends to stock-
421 holders of this company averaged $8\frac{8}{10}$ per cent. per annum, or, including an extra dividend of 20 per cent. in shares,

they averaged 10 per cent. per annum. After a 4 per cent. dividend, made in October, 1871, until October, 1876, no dividends were made. A dividend of 2 per cent. was made in October, 1876, and a like dividend of 2 per cent. has been since made semi-annually to the present time.

As one of the consequences of the joint-traffic contract, the receipts or earnings of the railroad partnership came into the possession, in the first instance, of the joint management or managing agent, through whom, after paying operating expenses and charges, they were to be distributed, 31 per cent. to the treasurer of this corporation and 69 per cent. to the treasurer of the Boston & Lowell Co.

Down to 1872 the contract was observed in this respect, and this company received its quota (31 per cent.) of the joint net earnings.

It is the belief of a majority, at least, of the directors that this company has not received its quota of the net earnings assigned to it by the joint contract at any time since July, 1872, and that the amount of such net earnings received by this company since that time has been about one-third less in amount than is provided by the contract itself.

Change in 1872 in making up the joint accounts.

The investigation undertaken by us, under the vote passed at the last annual meeting, resulted in the discovery, by some of us for the first time, of the fact that at a joint meeting of the directors of both corporations, held July 23, 1872, and upon the suggestion or motion of one of the directors of the Boston & Lowell Railroad Co., a vote was passed in the words following, viz:

"Voted, That the expenditures made and to be made by the Boston & Lowell Railroad Co. for land and building in Boston for a new station and the expenditures made and to be made by said corporation for the building and completing the Mystic River railroad and for the improvements in Winchester for a new station and land for railway purposes, to the amount of $20,000, are to be treated in the management of the business, under the joint-business contract
422 existing between said corporation and the Nashua & Lowell Railroad Co., as follows, viz: The said Boston & Lowell Railroad Co. are to be paid the interest upon such expenditures, made and to be made, at the rate of seven per cent. per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract; and the cashier of said two corporations and treasurer of the Boston & Lowell Railroad Co. is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston & Lowell Railroad Co. out of the joint receipts of said two corporations."

In consequence (as we are informed) of this vote, a change was at once made in the mode of finding or of computing the share of each

partner in the net earnings. The gross earnings were reduced to the extent of interest, reckoned at 7 per cent., upon the amount expended by the Boston & Lowell Co. on its new passenger station at Boston (now over $1,200,000) and upon the new station at Winchester ($20,000), the Mystic River R. R., etc., etc., and the sums so abated from the gross earnings have ever since been credited or paid over to the Boston & Lowell R. R. Co. The sums taken from the quota or share of the N. & L. R. R. Co. for this purpose (in excess of credits for interest on the cost of its new freight-house at Lowell) during the six years ending April 1, 1878, amount in all to $131,271.93, equal to 16.4 per cent. upon its entire capital stock, or 2.7 per cent. per annum upon such capital stock. We also learned that, in making up the accounts for several years past, your share of the gross earnings had been further reduced, to the amount of $26,406.44, by deductions of the interest upon the cost ($345,674) of shares in the Lowell & Lawrence and Salem & Lowell railroads, owned wholly by the Boston & Lowell Co., less the dividends derived from said shares, and that these sums also have been deducted from the gross earnings and credited in account and paid over to the Boston & Lowell Co. The sums so taken from your share of the net earnings amount in all to $174,583.37; or, deducting $16,905.20, credited you in joint account as 69 per cent. of the interest on your new freight-house at Lowell, they amount to $157,678.17.

All these deductions were made irrespectively of any rentals of roads leased by either party. Upon learning the above facts
423 a meeting of the directors was held on the 25th day of June, 1877, and a vote passed, of which the following is a copy:

"Voted, That whereas the vote of directors passed July 23, 1872, providing that the Boston & Lowell R. R. Co. should receive from the Nashua Company interest at 7 per cent. upon 31 per cent. of the cost or value of additions made by the former company to its property or construction account is deemed by us to be in plain violation of both the terms and the spirit of the joint-traffic contract itself, said vote of July 23, 1872, is hereby rescinded, not intending hereby to admit that it was ever competent for the directors by passing said vote to modify the provisions of said joint-traffic contract relating to division of expenses, or that said vote ever had any legal operation whatever in depriving the Nashua & Lowell Co. of the benefit of the provisions of said contract relating to the division of the joint earnings under the same.

Voted, That the clerk of the directors transmit a copy of this vote to the directors of the Boston & Lowell Railroad Co."

No notice whatever was taken by the directors of the Boston & Lowell Co. of this action on the part of your directors, and the managing agent continued as before to make up the joint accounts and to cut down the gross earnings as above and to reduce your account or share thereof accordingly. Failing to obtain any attention from the Boston & Lowell Co., in August last we sent to the directors of the Boston & Lowell Co. an offer to submit to arbitration the ques-

tion whether the Boston & Lowell R. R. Co. was entitled to take these so-called interest charges out of the gross receipts of the two roads before apportioning to the Nashua & Lowell Co. its quota of the net earnings.

This proposition, however, was not accepted, but a counter proposition for reference was made to us which we did not accept, and as your own board of directors has been divided in opinion upon this subject it is deemed advisable to lay the matter before the stockholders for them to consider and determine what action, if any, they will take in the premises.

This very considerable change in the mode of making up the joint accounts since 1872 is nowhere referred to in terms in any of the reports heretofore submitted to you, and it appears nowhere in such reports, except in the expense account, under the item entitled
" rent " or " rent account." The amount of this " rent " item
424 in the annual report for 1873 is $51,806.20; the same item in
report for 1874 is $81,973.81, or an increase in amount of $30,167.61.

The directors have carefully avoided any action which might operate as a ratification of the course pursued by the manager of the Boston & Lowell Co. in this matter or stand in the way of a rectification of the accounts, whenever you see fit to claim it.

(Counsel for plaintiffs only desire to use this report before the court to this point, and requests the clerk to end the printing here.

F. A. BROOKS, *For Plaintiffs.*)

* * * * * * *

It being deemed impracticable for all your directors to unite in laying before you a complete examination of the condition of the company and of the policy heretofore pursued, as well as some recommendations for the future, the directors appointed Messrs. Brooks, White, and Bailey a committee for the preparation of the annual report, with instructions to cause the same to be printed and circulated before the time of the meeting, and the foregoing is respectfully submitted by them as their report.

By order of the committee.

F. A. BROOKS, *Chairman.*

May 15, 1878.

DEFENDANTS' EXHIBITS.

DEFENDANTS' EXHIBIT 1. J. G. S., Ex'r.

(Put in evidence, page 172.)

BOSTON, *Sept.* 28, 1869.

The directors of the Nashua and Lowell railroad met at the office, in Boston, on Tuesday, the twenty-eighth day of September, at eleven o'clock in the forenoon. Messrs. Stearns, Spalding, Sigourney, and Richardson were present.

The manager submitted plans for the improvement of the terminal facilities at Boston, under the act of the last Legislature authorizing

the taking of land, and it was voted that Mr. Sigourney be a committee on the part of this Co. to act in conjunction with Messrs. Crowninshield, Minot, and Abbott, of the Boston and Lowell board in reference to the same.

425 BOSTON, *Nov.* 23, 1869.

The directors of the Nashua and Lowell Railroad Co. met at the manager's office, in Boston, on Tuesday, the twenty-third day of November, 1869, at 11 o'clock a. m.

Present: Messrs. Crowninshield, Richardson, Spalding, and Sigourney.

The committee upon the improvement of terminal facilities at Boston under the act of the last Legislature reported that an interview was had on the 8th inst. with the committee of the directors of the Eastern railroad, and that after a protracted conference, in which the Eastern Co. asked for a delay until after another legislative session, notice was given them of the intention of the Lowell Railroad Company to proceed to locate on land adjacent to Andover street, unless the Eastern road should signify before this date its intention to join them in the benefits of the act.

No communication has since been received from the Eastern road, and the committee recommend that the Lowell Railroad Company now proceed at once to locate upon so much of the territory embraced in the act as lies between their present lands on the northerly side of Andover street and the westerly side of Causeway street and the northerly side of Nashua street.

The report was accepted, and the Lowell railroad board voted that Messrs. Crowninshield and Abbott be a committee, with the manager, to prepare a location and report the same for ratification at the next monthly meeting of the board.

426 DEFENDANTS' EXHIBIT 2. J. G. S., Ex'r.

(Put in evidence, page 172.)

UNITED STATES OF AMERICA, *District of Massachusetts*, } *ss:*

NASHUA & LOWELL RAILROAD CORPORATION *v.* BOSTON & LOWELL RAILROAD CORPORATION *et al.* } In Equity .No. 1386.

To the Nashua & Lowell Railroad Corporation and to Francis A. Brooks, attorney of record:

You are hereby notified to produce, to be used as evidence in the above-entitled cause, the records of the doings of the board of directors of the Nashua & Lowell Railroad Corporation, now declared by you to be in your possession, from September 22d, 1853, to July 27th, 1875, inclusive, and also the records of the doings of the stockholders of the corporation aforesaid for the same time; also produce

all receipts, monthly statements, and papers and other written evidences of settlement between said corporations from January 1st, 1857, to July 27th, 1875.

The defendants in said action are desirous of putting in evidence in said case certified copies of the same.

A. A. STROUT AND
J. H. BENTON, JR.,
Def'ts' Att'ys.

I made service of the within by giving a duplicate thereof to Francis A. Brooks, within named, in hand, this 13th day of July, 1885.

A. A. STROUT.

Subscribed and sworn to before me July 13, 1885.
[SEAL.] JOHN G. STETSON,
U. S. Com'r.

427 DEFENDANTS' EXHIBIT 3. J. G. S., Ex'r.

(Put in evidence, page 174.)

BOSTON, *Jan.* 25, 1859.

At a meeting of the directors of the Nashua & Lowell Railroad Co., held at No. 5 Tremont street, in Boston, on Tuesday, 25th day of January, 1859, Messrs. Crowninshield, Stearns, Richardson, and Spalding were present.

The committee appointed to arrange a contract with the Boston & Lowell Railroad Co. reported that they had concluded such an arrangement, and submitted the same, duly executed by both parties, whereupon it was—

Voted, That the contract this day submitted by the committee, extending for a period of twenty years from the first day of October, 1853, the present contract for the joint operation of the Boston & Lowell and Nashua & Lowell roads, and embracing therein the agreements of the Boston & Lowell R. R. Co. to operate the Salem & Lowell and Lowell and Lawrence railroads, is hereby ratified and approved.

Voted, That the subject of a renewal of the existing contract with the Stony Brook R. R. be referred to Mr. Richardson, on the part of this board, to act in conjunction with Mr. Abbott, appointed by the Lowell R. R. board.

Voted, That Mr. Stark be authorized to make such compensation to A. Rolfe, of Lowell, for expenses incurred in the suit against Nutting for freight as he may consider just.

In joint session with the Boston & Lowell board:

The manager reported—

A contract with Vermont & Boston Telegraph Co.

A contract with John A. Kernochan, of New York, for 300 tons hammer-headed rails.

A proposed contract with F. Lovejoy and others for coaching business at Lowell.

A proposed contract with Amos Tufts for lease of manufacturing company's wharf in Boston.

A proposed contract with W. P. Phillips for wharfage at Salem.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

428 DEFENDANTS' EXHIBIT 4. J. G. S., Ex'r.

(Put in evidence, page 174.)

BOSTON, *April* 26, 1859.

At a meeting of the directors of the Nashua & Lowell Railroad Co., held at No. 5 Tremont St., in Boston, on Tuesday, the 26th day of April, 1859, at 11 o'clock in the forenoon, Messrs. Crowninshield, Stearns, Richardson, and Spalding were present.

On presentation of the treasurer's semi-annual account, it was—

Voted, That a dividend of four dollars per share be declared payable on Monday, the second day of May next, to holders of Nashua & Lowell railroad stock, at the close of business this day.

Voted, That F. B. Crowninshield, president, and Geo. Stark, agent, be a committee with authority to take such measures as they may deem expedient in all matters of connection with the Concord railroad.

In joint session with the Boston & Lowell board:

The manager submitted his semi-annual statement of income and expenses.

Voted, That the manager be authorized to make such changes and improvements in the refreshment room at Boston depot as he may think proper.

Voted, That Mr. Richardson, in connection with Mr. Hinckley, on the part of the Boston & Lowell road, be a committee with full powers to adjust and settle the agreement of 1853 between the Nashua & Lowell and the Connecticut & Passumpsic Rivers railroads.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 5. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Oct.* 25, 1859.

At a meeting of the directors of the Nashua and Lowell Railroad Co., held at No. 5 Tremont street, in Boston, on Tuesday, the 25th day of October, 1859, Messrs. Crowninshield, Stearns, Spalding, and Richardson were present.

429 Voted, That a dividend of four dollars per share be declared, payable on Tuesday, the first day of November next, to holders of Nashua & Lowell railroad stock at the close of business this day.

In joint session with the Boston & Lowell board:

The manager submitted a statement of the earnings of the past six months.

Voted, That the renewal of the contract with the Wilton railroad be referred to Mr. Spalding, on the part of this board, to be joined by a committee on the part of the Boston & Lowell railroad.

Voted, That the proposed modification of the existing contract with the Stony Brook railroad be referred to Mr. Amory, on the part of the board, to be joined by a committee on the part of the Boston and Lowell road.

Voted, That the manager be authorized and directed to take and require bonds, with sufficient sureties, in his name for the use and benefit of this corporation and the Boston and Lowell Railroad Corporation, for such persons employed in the business of this corporation and said Boston and Lowell Railroad Corporation as he shall judge proper and necessary; said bonds to be in such penal sums and with such conditions as he shall deem for the interests of this corporation and said Boston and Lowell Railroad Corporation.

Voted, That this corporation accept as valid all bonds heretofore taken by the manager.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 6. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Oct.* 23, 1860.

The directors met in Boston.

Messrs. Spalding, Richardson, and Stearns present.

Mr. Richardson was chosen president *pro tem.* The manager submitted statement of earnings of six months ending Oct. 1st.

Voted, That the treasurer be authorized and directed to declare a dividend of four dollars per share, payable on the first day of Nov. next, to the holders of stock at the close of business this day.

An application from the station agent at Milford, James Blood, for reimbursement of money stolen from his office was presented.

Voted, That the matter be submitted to the manager, with full powers to allow him such sum as he may think proper.

430 Voted, That Mr. Spalding be a committee on the part of this board, to be joined by a committee on the part of the Boston & Lowell board, to ascertain upon what terms the tenement houses of the Boston & Lowell Co. on Andover St., in Boston, can be removed and the ground occupied for an extension of the passenger depot, etc.

Voted, That an application of the selectmen of Medford for the erection of gates at West Medford be referred to the manager.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 7. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Dec.* 24, 1860.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation, held at the Lowell depot, in Boston, on Monday, the twenty-fourth day of December, A. D. 1860, Messrs. Crowninshield, Richardson, and Spalding were present.

The monthly statement of the manager was presented and read.

A communication from the directors of the Stoneham Branch Railroad Corporation, desiring a conference with a committee of this road upon the subject of operating said Stoneham Branch when completed, was read, and it was thereupon—

Voted, That the president and manager be a committee with full powers to make arrangements with the Stoneham Branch Railroad Corporation for operating said branch road upon such terms as said committee may deem proper.

The directors of the Lowell and Lawrence Railroad Corporation presented, through Mr. Abbott, of the Boston and Lowell board, a petition to be allowed free passes over the Boston and Lowell and Nashua and Lowell roads. Whereupon it was—

Voted, That Mr. Richardson, of this board, with such as the Boston and Lowell board may join, be a committee to consider the expediency of granting the prayer of said petitioners, and that they be requested to report at the next meeting of the board.

Voted, That the manager, with the treasurer of the Boston and Lowell road, be a committee to ascertain whether any taxes have been paid upon property within the location of the Boston and Lowell road.

431 The committee appointed Oct. 23 "to ascertain upon what terms the tenement houses of the Boston and Lowell Corporation on Andover street, in Boston, can be removed and the ground occupied for an extension of the passenger depot" submitted the following report:

To the directors of the Boston and Lowell and Nashua and Lowell Railroad Corporations.

GENTLEMEN: The joint committee appointed by you to consider the expediency of making an addition to the passenger station-house in Boston respectfully report—

That, in their opinion, an addition of about two hundred feet to the length of the house is required for the proper accommodation of the joint traffic; and that, inasmuch as such extension will render it necessary to use that portion of the land reserved under the joint contract of 29th of January, 1857, to the sole use of the Boston and Lowell Railroad Corporation, which lies upon Andover street and is now occupied by their brick block of five houses, it will be equitable that the joint roads pay annually to the Boston and Lowell

Railroad Corporation $1,000 and taxes during the existence of the joint contract as rent for the use of said portion or lot of land, it being understood that the material of the five houses aforesaid be sold or used for the benefit of the joint companies, and that a record of the value of the same, as well as of the cost of the new structure, be kept for the purpose of facilitating an equitable adjustment on termination of the joint contract.

EDWARD SPALDING,
On Part of Nashua and Lowell Railroad Corporation.
ISAAC HINCKLEY,
On Part of Boston and Lowell Railroad Corporation.

DECEMBER, 1860.

Voted, That the report be accepted, and that the same committee be desired to report upon what terms the triangular piece (so called) without the location at Boston station can be leased to the joint roads.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

432 DEFENDANTS' EXHIBIT 8. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Nov.* 26, 1861.

The directors of the Nashua and Lowell Railroad Corporation met at eleven o'clock a. m., Messrs. Crowninshield, Richardson, Spalding, and Sigourney being present.

The monthly statement was submitted.

Voted, That the manager be authorized to contract with the Post Office Department for transportation of mails upon the several railroads operated by the Boston and Lowell and Nashua and Lowell Railroad Companies for four years from the first day of July last upon terms not less than heretofore received for such service, and that the treasurer be directed to attach the seal of the corporation to such contracts.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 9. J. G. S., Ex'r.

(Put in evidence, page 175.)

The directors of the Nashua and Lowell Railroad Corporation met at the Lowell depot, in Boston, on Tuesday, the twenty-fifth day of March, 1862, at eleven o'clock a. m.

Messrs. Crowninshield, Richardson, Spalding, and Sigourney were present.

The manager submitted and read statements of receipts and expenses for the months of January and February.

Voted, That the manager be authorized to make a reduction of the wages of the operatives upon the road of about ten per cent., at his discretion.

Voted, That the manager (Geo. Stark) be, and hereby is, authorized, on behalf of this corporation, to contract with the Government of the United States for transportation of mails for the period of four years from the first day of July, 1861, upon and over the railroads and branches operated by the Boston and Lowell railroad and Nashua and Lowell Railroad Corporations, viz., the Boston and Lowell railroad, the Nashua and Lowell railroad, the Wilton railroad, the Stony Brook railroad, the Lowell and Lawrence
433 railroad, the Salem and Lowell railroad, the Woburn Branch railroad, and the Stoneham Branch railroad; and he is also hereby authorized to receive and receipt for, in person or by order, on behalf of this corporation, all payments due and to become due said Boston and Lowell and Nashua and Lowell Railroad Corporations on account of such contracts for the period aforesaid.

The committee (Messrs. Crowninshield and Stark) appointed Dec. 24, 1860, to make arrangements with the Stoneham Branch railroad for operating said branch road reported an agreement, signed by said committee, to lease the same, which was read by the manager.

A contract for the sale or lease to the United States Government of two locomotive engines was reported by the manager; also that he had contracted for the purchase of another.

Voted, That it is expedient to collect from passengers passing over this road any and all taxes that may be levied by the United States Government.

Voted, That Hon. J. G. Abbott and the manager be a committee to represent this corporation before the finance committee of the State Legislature in reference to a direct tax upon corporations.

Mr. Richardson, the committee appointed April 23, 1861, to release the interest of the corporation to certain real estate in Essex county, Mass., set off on suit of A. Rolfe, agent, in name of this corporation *v.* Nutting, reported a quitclaim deed, which was signed by the directors present.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 10. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Aug.* 25, 1863.

The directors met at the Boston depot at eleven o'clock a. m. Messrs. Crowninshield, Richardson, Stearns, Sigourney, and Spalding were present.

The monthly statements of June and July were read. On suggestion of the manager that some of the reserved lands of
434 this corporation and of the Boston and Lowell corporation might be made serviceable for the present and prospective joint business, it was—

Voted, That the president and manager be a committee to consider what additional land it may be necessary to obtain from the reserved portion of the Boston and Lowell and the Nashua and Lowell Railroad Corporations for the use of the joint roads.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 11. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Aug.* 23, 1864.

The directors of the Nashua and Lowell railroad met at the manager's office at eleven o'clock a. m.

Messrs. Crowninshield, Spalding, and Richardson were present.

The usual monthly statements were read. The following preamble and resolution was passed:

Whereas the contract between the Boston and Maine railroad and the Boston and Lowell and Nashua and Lowell railroads for the division and adjustment of upper railroad business expired by its own limitation on the first day of April last, and it is apparently for the interest of both parties that some new agreement should be entered into for the future partition of the same—

Resolved, That Daniel S. Richardson and George Stark, manager, be a committee from this board, with such as the Boston and Lowell road may join, to negotiate with the Boston and Maine Railroad Company for such a contract as, in the judgment of such committee, may best tend to maintain desirable and profitable relations with the business in question.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

435 DEFENDANTS' EXHIBIT 12. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Dec.* 27, 1864.

The directors of the Nashua and Lowell road met at the depot in Boston on Tuesday, the twenty-seventh day of December, 1864, at twelve o'clock a. m.

Messrs. Crowninshield, Richardson, Sigourney, and Spalding were present.

The monthly statements of accounts were presented and read. The annual reports to the Legislature of Massachusetts were signed.

The manager reported a negotiation with the Concord Railroad Company for a joint business contract and asked the appointment of a committee to be associated with him in continuing such negotiation, and it was—

Voted, That Messrs. Richardson and Stark be a committee on the part of this board, to be joined by Messrs. Hinchley and Abbott on

the part of the Boston and Lowell board, with authority to arrange such a business contract with the Concord Railroad Company as, in the judgment of said committee, may conduce to the best interests of this company and to report the same to this board.

The treasurer presented the following communication from Waldo Higginson, Esq., in reference to certain lost certificates:

31 KILBY STREET, BOSTON, *Nov.* 22, 1864.

Geo. Stark, Esq., manager Nashua and Lowell R. R.

DEAR SIR: You were duly informed of the loss of certain certificates of shares in your company, stolen from my office here by burglars, who broke into my safe between the evening of April 21 and the morning of April 22, 1863.

These certificates were, one for five shares in the name of Louisa Higginson, one for five shares in the name of Anna S. Higginson, and one for five shares in the name of S. Louisa Higginson.

The loss was duly advertised and a reward of $100 offered for the recovery of the property lost, and a noted detective employed, but no trace of the loss has come to light.

In consequence of the death of my mother, the above-mentioned Louisa Higginson, on the 15th inst., it becomes necessary to get a new certificate, and the time is taken for the others.

436 Will you be so kind as to furnish them on your usual terms for such contingencies?

Yours, resp'y,

(Signed) WALDO HIGGINSON.

Whereupon it was—

Voted, That the treasurer be directed to issue new certificates to the said parties or their legal representatives upon their depositing in his hands satisfactory bonds of indemnity.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 13. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Feb.* 27, 1865.

The directors of the Nashua and Lowell railroad met at the office of the manager, in Boston, on Tuesday, the twenty-seventh day of February, 1865, at eleven o'clock a. m.

The whole board was present.

The monthly statement of accounts was read. The manager reported a contract duly executed between the Boston and Lowell and Nashua and Lowell road on one part and Concord railroad on the other part for the mutual conduct of the business of the three roads for the term of thirteen years from Feb. 1, 1865.

A communication, dated Feb. 24, 1865, from the president of the Boston and Maine Railroad Company relative to a change of com-

pensation for the use of tracks, stations, services of employees, etc., at Lawrence, having been read, it was—

Voted, That the same be committed to the manager and Mr. Richardson, with Messrs. Abbott & Hinckley, of the Boston and Lowell board, with full powers to make such arrangements as they may think proper.

Voted, That the same committee be authorized to treat with the upper railroads in regard to our relations with them.

Voted, That the manager and Judge Abbott be a committee with full powers to settle a claim of Mrs. Willoughby, of Lowell, for personal injury sustained in stepping from a car when in motion.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

437 DEFENDANTS' EXHIBIT 14. J. G. S., Ex'r.

(Put in evidence, page 175.)

BOSTON, *Dec.* 26, 1866.

The directors of the Nashua and Lowell Railroad Corporation met at the manager's office at eleven o'clock a. m.

Messrs. Crowninshield, Sigourney, Richardson, and Stearns were present. The monthly report was read.

The manager stated that the stockholders in the Stony Brook road were, many of them, desirous to negotiate a new and extended lease of their road, provided it could be so made as to yield them about six per cent. over taxes; and it was—

Voted, That the president, manager, and Mr. Richardson be a committee, on the part of this board, with Mr. Minot, on the part of the Boston and Lowell board, to confer with a committee of the Stony Brook road in reference to an extension of their lease of road to the Nashua and Lowell Railroad Corporation or a new lease to the Boston and Lowell and Nashua and Lowell Railroad Companies.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 15. J. G. S., Ex'r.

(Put in evidence, page 176.)

NASHUA, *Sept.* 22, 1858.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation, held at the manager's office, in Nashua, on Wednesday, the twenty-second day of September, A. D. 1858, Messrs. Crowninshield, Stearns, and Spalding being present.

Voted, That Messrs. Stearns and Richardson be a committee to arrange a contract with the Boston and Lowell Railroad Company, in conformity with the authority this day conferred by the stockholders, and to report the same to this board for ratification.

Voted, That the treasurer be authorized to adjust our ac-
438 counts with the Concord Railroad Company in conformity with the award of referees rendered Aug. 13, 1858.

The meeting was then dissolved.

A true record.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 16. J. G. S., Ex'r.

(Put in evidence, page 179.)

BOSTON, *Sept.* 28, 1869.

The directors of the Nashua and Lowell railroad met at the office, in Boston, on Tuesday, the twenty-eighth day of September, at eleven o'clock in the forenoon.

Messrs. Stearns, Spalding, Sigourney, and Richardson were present.

The monthly statement of accounts was presented and read. The manager submitted a copy of petition of twenty-three citizens of Lowell to the Lowell city government requesting them to call out the railroad commissioners to hear certain complaints as to express and other accommodations; and it was—

Voted, That the manager and Mr. Hosford, of the Lowell railroad board, be a committee to represent the interests of the company before said commissioners.

The treasurer sent in a communication from Sarah W. W. Merriam stating that her certificate of three shares in this company had been stolen, and requesting a new one to be issued.

The bond presented therewith, being satisfactory, was accepted, and the treasurer was directed to place the same on file and to issue a new certificate.

Voted, That the president and manager be a committee to confer with the Stoneham Branch Railroad Company with reference to a purchase or lease of their road.

The manager submitted plans for the improvement of the terminal facilities at Boston under the act of the last Legislature authorizing the taking of land; and it was—

439 Voted, That Mr. Sigourney be a committee, on the part of this company, to act in conjunction with Messrs. Crowninshield, Minot, and Abbott, of the Boston and Lowell board, in reference to the same.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 17. J. G. S., Ex'r.

(Put in evidence, page 179.)

BOSTON, *Nov.* 23, 1869.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Nov. 23, 1869, is printed on pages 364 to 367 of this volume, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 18. J. G. S., Ex'r.

(Put in evidence, page 179.)

BOSTON, *Dec.* 28, 1869.

The directors of the Nashua and Lowell Railroad Corporation met at the office of the manager, in Boston, on Tuesday, the twenty-eighth day of December, 1869, at eleven o'clock a. m.

Messrs. Crowninshield, Spalding, Richardson, and Sigourney were present.

The monthly statements were read.

The manager presented a proof of a modified freight tariff, to go into effect on the first day of January next, reducing the price of freight on coal and some other articles; and it was—

Voted, That the new freight tariff submitted by the manager, to go into effect on the first day of January next, be ratified and approved by this board.

The committee on new location in Boston reported a communication from the Eastern Railroad Company signifying their intention to recommend to their stockholders to join in the improvements. The said committee advised that no further action be taken until after the annual meetings of the companies.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 19. J. G. S., Ex'r.

(Put in evidence, page 179.)

BOSTON, *Oct.* 25, 1870.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held at the manager's office, in Boston, on Tuesday, the twenty-fifth day of October, 1870, at eleven o'clock a. m. The full board was present.

The semi-annual accounts were presented.

The manager submitted a written report upon the subject of negotiations between the Boston and Lowell Railroad Corporation and the Eastern Railroad Company relative to taking land, under the act of 1869, for enlarging the depot facilities in Boston. The report was accepted and ordered to be placed upon file, and the manager was directed by the Boston and Lowell board to notify the Eastern Railroad Company that the negotiation was closed. Upon motion of Dr. Spalding, it was—

Voted, That a dividend of five per cent. and Government tax be declared payable, on the first day of November next, to holders of stock at the close of the business this day.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 20. J. G. S., Ex'r.

(Put in evidence, page 179.)

BOSTON, *Dec.* 27, 1870.

The directors of the Nashua and Lowell Railroad Corporation met at the manager's office, in Boston, on Tuesday, the twenty-seventh day of December, at eleven o'clock a. m.

441 Messrs. Crowninshield, Spalding, and Sigourney were present. The monthly accounts were submitted.

Voted, That the manager be authorized to contribute from the joint funds of the Boston and Lowell and Nashua and Lowell roads four hundred and one dollars and thirty-four cents in addition to the sum of three thousand dollars already contributed towards the construction of the Mt. Washington railway.

A petition was presented from Jas. S. Dunlap, adm'r of Asa Woods, asking for the issue of a new certificate of two shares in place of one lost.

Voted, That the treasurer be authorized to issue such new certificate upon the receipt of the customary affidavit and bond of indemnity.

The subject of purchase of the majority of the stock in the Lowell and Lawrence and Salem and Lowell roads was referred to a joint committee consisting of Messrs Minot and Abbott of the Lowell board, and Mr. Spalding, of this board.

The subject of the location of the Mystic River connection and the purchase of property of Mystic River Improvement Company was referred to a joint committee consisting of Messrs. Hosford and Codman, of the Lowell board, and Mr. Sigourney, of this board.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

BOSTON, *Jan.* 24, 1871.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held at the manager's office, in Boston, on Tuesday, the twenty-fourth day of January, 1871.

Messrs. Crowninshield, Spalding, Richardson, and Sigourney were present.

The manager submitted his monthly statements and presented various communications to the board.

Voted, That in consideration of the hospital of the Sisters
442 of Charity, located at Lowell, being open and used by the employés of the road, the manager is hereby authorized to give mileage tickets or free passage to such of them as he may deem best.

The manager submitted and read an estimate of cost of the proposed new station-house in Boston, and presented plans of the same.

Voted, That the manager be authorized to sign, on behalf of this corporation, a power of attorney herewith presented to the board

authorizing Caleb Cushing and Richard S. Spofford to demand and take lawful means to collect all sums erroneously paid as taxes to the United States by this corporation prior to Dec. 31, 1872.

Voted, That said Cushing and Spofford shall be entitled to receive and retain ten per cent. of any sum so collected of the Government, in full for any expense, costs, or charges in the prosecution of such claims, and without any other liability on the part of said corporation.

The committee upon the subject of purchasing lands for a branch railroad to connect with the Mystic River railroad and lands and flats in Charlestown for terminal purposes reported, through Mr. Codman, in writing.

Voted, That the president constitute one of the above committee.

Voted, by the Boston and Lowell board, That Messrs. Crowninshield, Codman, and Hosford, a committee, be empowered, in behalf of this corporation, to file the location of the branch railroad authorized by an act of the Legislature, approved Feb. 7, 1870, entitled "An act to authorize the Boston and Lowell railroad to construct a branch railroad to the Mystic River railroad, and for other purposes."

Voted, That Mr. Sigourney, of this board, in connection with the foregoing committee on the part of the Boston and Lowell Railroad Corporation, be further empowered to make purchase of land, wharves, and flats of the Mystic River Corporation for track, station, and terminal purposes.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

443 DEFENDANTS' EXHIBIT 21. J. G. S., Ex'r.

(Put in evidence, page 279.)

BOSTON, *Feb.* 6, 1871.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Feb. 6, 1871, is printed on pages 368 and 369 of this volume, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 22. J. G. S., Ex'r.

(Put in evidence, page 179.)

BOSTON, *Feb.* 20, 1871.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held at No. 65 Washington street, Boston, on Monday, the twentieth day of February, 1871, Messrs. Crowninshield, Spalding, Richardson, and Sigourney were present.

The president read the following communication:

BOSTON, *Feb.* 17, 1871.

Hon. Francis B. Crowninshield, pres. Boston and Lowell R. R. Co.

DEAR SIR: Our board of directors have appointed a committee, consisting of Messrs. Haven, Williams, Lothrop, with myself, to confer with any committee your board may see fit to appoint, with reference to terminal facilities and arrangements here in Boston.

Very respectfully, your ob'd't serv't,

(S'g'd) GEO. M. BROWNE.

After full discussion of the subject-matter of the above letter it was—

Voted, That the committee having formerly in charge the negotiations with the Eastern railroad relative to terminal facilities in Boston, viz., Messrs. Crowninshield and Sigourney, of this board, with Messrs. Minot and Abbott, of the Boston and Lowell board, be requested to meet the committee of the Eastern road and to report at the next regular monthly meeting.

444 The following agreement with the Mystic River Corporation, as signed by the president of the Boston and Lowell railroad, was ratified and approved:

Whereas the Mystic River Corporation, a corporation duly established by law, has this day sold and conveyed to the Boston and Lowell and the Nashua and Lowell Railroad Corporations, both corporations being duly established by law, a portion of its lands and improvements in Mystic river, in Charlestown, county of Middlesex and Commonwealth of Massachusetts; and

Whereas the construction of the Mystic River railroad, as authorized by its existing charter, is essential to the development of the interests of the Mystic River Corporation and of the grantors of the free right of way hereinafter referred to; and

Whereas the control and ownership of the franchise, rights and property of the said Mystic River railroad has been placed in sundry persons designated by and as trustees for said Boston and Lowell Railroad Corporation, among which rights and property is an agreement in writing, dated Dec. 6, 1870, signed by J. E. Bartlett, P. J. Stone, Daniel E. Chase, and others, granting a free right of way to said Mystic River railroad, its successors and assigns, to build a railroad over the lands of said parties, respectively, between Johnson's wharf and Elm street, in said Charlestown:

Now, therefore, in consideration of the foregoing conveyance and transfer, the said Boston and Lowell Railroad Corporation hereby agree to and with said Mystic River Corporation, its successors and assigns, and those who have executed or may execute said agreement of Dec. 6, 1870, their heirs and assigns, respectively, that said Mystic River railroad shall be located and built within the time and as is required by existing acts of the Legislature of said Commonwealth relating to said Mystic River railroad, and that in case any other

railroad company or companies shall hereafter desire to run their cars with their own engines over that portion of said Mystic River railroad which lies between the Boston and Maine railroad and Grand Junction Branch of the Boston and Albany railroad and the land this day conveyed by said Mystic River Corporation to said Boston and Lowell and Nashua and Lowell railroads near said Elm street in order to reach other land now belonging to said Mystic River Corporation or other wharves on said Mystic river, then said other railroad company or companies shall be allowed so to run their cars and engines under the rules and regulations of said Boston and Lowell Railroad Corporation and by paying said last-named corporation such rates of toll as shall be mutually agreed upon by said railroad corporations, and in case of disagreement as to rates of toll such rates of toll shall be fixed by three competent and impartial men, to be chosen one by each of the respective parties and the third by the two men so chosen; and in case either party shall
445 neglect or refuse to join in such reference and the appointment of the referees as aforesaid, then said reference shall be appointed by the supreme judicial court of Massachusetts on the petition of the other party.

In witness whereof the said Boston and Lowell Railroad Corporation has caused its corporate seal hereto to be affixed and these presents to be signed in its name by F. B. Crowinshield, its president, duly authorized, this seventeenth day of February, eighteen hundred and seventy-one.

THE BOSTON AND LOWELL RAILROAD CORPORATION,
By F. B. CROWNINSHIELD, *President Thereof.*

In presence of—

JOHN H. GEORGE. 50c. stamp. Seal of the B. & L. R. R. Corp.

GEO. STARK.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 23. J. G. S., Ex'r.

(Put in evidence, page 179.)

BOSTON, *Sept.* 26, 1871.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held at the manager's office, in Boston, on Tuesday, the twenty-sixth day of September, 1871, at eleven o'clock in the forenoon, Messrs. Crowninshield, Sigourney, Richardson, and Spalding were present.

The manager submitted his monthly statements.

Voted, That the action of the committee appointed Feb. 6, 1871, relating to the contract executed Feb, 24, 1871, between the North-

ern Transportation Company, the trustees and managers of the Vermont Central and Canada Railroad Companies, the Northern railroad of N. H., the Nashua and Lowell Railroad Corporation, and the Boston and Lowell Railroad Corporation be approved, and that the execution of said contract by said committee be ratified and confirmed.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

446 BOSTON, *May* 28, 1872.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held at the office of the manager, in Boston, on Tuesday, May 28, 1872, at 11 o'clock a. m.

Present: Messrs. Crowninshield, Spalding, and Sigourney.

The monthly statement of receipts and expenditures for April was read. Printed copies entitled "Rules of the Boston and Lowell and Nashua and Lowell Railroad Companies for the government of the executive service, revised and adopted by the board of directors," was submitted by the manager, when it was—

Voted, That the same be adopted by this board.

Printed copies entitled "Local passenger tariff, Boston, Lowell and Nashua R. R. and branches, take effect June 1, '72," were submitted by the manager, when it was—

Voted, That the same be adopted by this board.

The manager submitted and read a form of agreement between the Middlesex Central railroad and the Boston and Lowell R. R. Corporation for the leasing of a contemplated railroad to be built between Lexington and Concord by the former company, when it was—

Voted, That the committee upon the subject (Messrs. Crowninshield, Richardson, and Sigourney) be authorized to join the Boston and Lowell R. R. Company in such agreement, substantially in the form herewith submitted.

Voted, That the president and Mr. Sigourney, with such as the Boston and Lowell board may join, be a committee to confer with the Eastern Railroad Company in reference to providing additional depot facilities in Boston for their road.

Voted, That Mr. Sigourney be a committee, with such as the Boston and Lowell board may join, to confer with the Mass. Central railroad with regard to terminal facilities in Boston and a third track to Somerville.

Voted, That the manager be authorized to contribute two hundred and fifty dollars towards the expense of furnishing the true time from the Cambridge observatory.

Voted, That the manager be authorized to purchase of the Lowell Gas-Light Co., for a sum not exceeding eleven hundred dollars, about 4,250 square feet of land on the northerly side of the railroad tracks near School street, in Lowell.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

447 BOSTON, *July* 23, 1872.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held at the manager's office, in Boston, on Tuesday, the twenty-third day of July, 1872, Messrs. Crowninshield, Richardson, and Sigourney were present.

The monthly statement was presented and read. The manager reported that a discrepancy existed between the records of the Boston and Lowell and of the Nashua and Lowell roads as to the committee authorized to sign the contract of the Middlesex Central railroad, and it was—

Voted to amend the records of this board of May 28, 1872, by substituting the name of Edward Spalding in place of the name of Henry Sigourney on the committee for executing the Middlesex Central railroad contract.

A communication from Gen. B. F. Butler, president of the Wamesit Power Company of Lowell, with a proposed contract relative to the right of way and maintenance of the branch track extending beyond the Lowell bleachery, was referred to Messrs. Daniel S. Richardson and Hocum Horsford, with full powers.

The meeting was then adjourned to Young's Hotel.

At 2 o'clock p. m. on the above-named date the directors met, according to adjournment, at Young's Hotel, in Boston.

Messrs. Crowninshield, Stearns, Richardson, and Sigourney were present. Judge Abbott, of the Boston and Lowell board, presented the subject of expenditures made and being made by the several companies for improvements, and it was—

Voted, That the expenditures made and to be made by the Boston and Lowell Railroad Corporation for land and building in Boston for a new station and the expenditures made and to be made by said corporation for the building and completing the Mystic River R. R. and for the improvements in Winchester for a new station and land for railway purposes, to the amount of $20,000, are to be treated in the management of the business under the joint business contract existing between said corporations and the Nashua and Lowell R. R. Corporation as follows, viz: The said Boston and Lowell R. R. Corporation are to be paid the interest upon such expenditures made and to be made, at the rate of seven per cent. per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as
448 a part of the expenses of operating said railways under said contract; and the cashier of said two corporations and treasurer of the Boston and Lowell R. R. Corporation is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston and Lowell R. R. Corporation out of the joint receipts of said two corporations.

Voted, That until a different agreement is made between the Boston and Lowell and the Nashua and Lowell R. R. Corporations that the use and rents of about 133,000 square feet of land in Lowell, between the Northern avenue and the Pawtucket canal, and of the flour store and lot of land on Thorndike street near Dutton street,

in Lowell, belonging to the Nashua and Lowell R. R. Corporation, and of about 200,000 feet of land in East Cambridge, filled in since the year 1858, belonging to the Boston and Lowell R. R. Corporation, shall belong to the two corporations under their joint business contract without further allowance therefor to either corporation, provided, however, it is not by this arrangement intended to express any opinion as to the actual or relative value of said parcels of land.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

BOSTON, *Oct.* 22, 1872.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held at the manager's office, in Boston, on Tuesday, the twenty-second day of October, 1872, Messrs. Crowninshield, Spalding, Richardson, and Sigourney were present.

The semi-annual accounts were presented, and it was—

Voted, That a dividend of five per cent., free of taxes, be made, payable on the first day of November, to holders of stock at the close of business of this day. The manager and Messrs. Richardson, of this board, and Hosford, of the Boston and Lowell board, were appointed a committee to purchase lands in Lowell for approaches to the contemplated new freight-house.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

449 DEFENDANTS' EXHIBIT 24. J. G. S., Ex'r.

(Put in evidence, page 223.)

Thirty-seventh Annual Report of the Directors of the Nashua and Lowell Railroad Corporation, May 29, 1872.

Report.

(Page 3.)

The directors of the Nashua and Lowell railroad hereby submit to the stockholders their report for the year ending March 31, 1872.

Earnings and expenditures.

The proportion allotted to this company under its joint contract with the Boston and Lowell Railroad Corporation of the gross earnings of the several roads operated by them is five hundred and fifty-seven thousand eight hundred and sixty-two dollars and five cents.

The ordinary expenditures and rents are four hundred and forty-seven thousand one hundred and sixty-seven dollars and forty cents.

From the balance of earnings two semi-annual dividends of five per cent. each have been paid, amounting in the aggregate to eighty

thousand dollars. The sum of fifteen thousand dollars has been appropriated to renewals, and fifteen thousand six hundred and ninety-four dollars and sixty-five cents has been placed to the credit of the contingent fund.

The detail of receipts and expenses is as follows:

(Page 4.)

Receipts.

From freight	$298,780 43	
" passengers	240,012 78	
" express	6,483 78	
" mails	6,447 71	
" interest	6,137 35	
Total gross receipts		$557,862 05

Expenses.

For repairs of road	$81,195 69	
" " engines	28,512 11	
For repairs of freight cars	28,182 60	
450 " " passenger cars	19,635 35	
" " fences and houses	13,242 38	
For repairs of bridges	6,169 02	
" " depots	3,943 16	
" fuel	52,496 93	
" oil and waste	9,013 26	
" enginemen and firemen	24,021 65	
" conductors and brakemen	15,670 23	
" merchandise expenses	45,675 80	
" stationmen	10,669 86	
" switchmen and gatemen	9,940 08	
" office expenses	6,257 37	
" miscellaneous expenses	14,830 31	
" advertising and stationery	4,066 99	
" State and local taxes and insurance	23,123 03	
" Gov. tax on dividends and surplus	3,379 29	
" damages and gratuities	4,633 40	
" rents	42,066 46	
" ice and snow	442 43	
" renewals	15,000 00	
" dividends, ten per cent.	80,000 00	
" balance earnings carried to contingent fund	15,694 65	
		$557,862 05

(Page 5.)

In pursuance of authority conferred by you at the last annual meeting an agreement has been entered into for the extension of the Wilton railroad under the charter of the Peterborough Railroad Company for a distance of about ten miles, to Greenfield.

A copy of this agreement is appended hereto, and also a copy of an extended agreement for the operation of the Wilton railroad.

Respectfully submitted by—

F. B. CROWNINSHIELD,
ONSLOW STEARNS,
DAN'L S. RICHARDSON,
HENRY SIGOURNEY,
EDWARD SPALDING,
Directors.

451 *Report of the Auditing Committee.*

The undersigned have examined the books and accounts and cash statements of the treasurer of the Nashua and Lowell Railroad Corporation for the year ending with March 31, 1872, and find the same clearly expressed and all payments properly vouched.

B. B. WHITTEMORE,
WILLIAM W. BAILEY,
Auditing Committee of Stockholders.

(Page 6.)

Balance-Sheet, April 1, 1872.

DR.

Road-bed and real estate	$343,616 14
Superstructure	161,418 48
Buildings and bridges	119,265 05
Engines	53,000 00
Passenger cars	19,300 00
Merchandise cars	41,106 16
Material charged to B. and L. and N. and L. roads	70,258 58
Notes receivable	65,500 00
Cash on deposit	83,218 45
Raising and protecting track at Tyngsboro'	30,000 00
Mystic River quay	91,295 36
	$1,077,978 22

CR.

Capital stock	$800,000 00
Unclaimed dividends	852 68
Renewals on road and buildings	45,000 00
Dividend No. 67, declared	40,000 00
Suspense account	17,705 83
Contingent fund	125,594 71
Boston and Lowell R. R.	48,825 00
	$1,077,978 22

452 (Page 7.)

Contingent Fund in Account Current for Year Ending March 31, 1872.

DR.

Balance—working materials, notes, and cash	$125,594 71

CR.

Balance brought forward from last year	$108,300 06
By real estate in Westford, sold to the Stony Brook railroad	1,600 00
By earnings	15,694 65
	$125,594 71

(Page 8.)

Income and Expense Account for Year Ending March 31, 1872.

DR.

Repairs road	$81,195 69
" engines	28,512 11
" freight cars	28,182 60
" passenger cars	19,635 35
" fences and houses	13,242 38
" bridges	6,169 02
" depots	3,943 16
Fuel	52,496 93
Oil and waste	9,013 26
Enginemen and firemen	24,021 65
Conductors and brakemen	15,670 23
Merchandise and depot expenses	45,675 80
Stationmen	10,669 86
Switchmen and gatemen	9,940 08
Office expenses	6,257 37
Miscellaneous expenses	14,830 31
Advertising and stationery	4,066 99
Taxes and insurance	26,502 32
Damages and gratuities	4,633 40
Rent	42,066 46
Ice and snow	442 43
Renewals	15,000 00
453 Dividends, ten per cent.	80,000 00
Contingent fund	15,694 65
	$557,862 05

CR.

Freight receipts	$298,780 43
Passenger "	240,012 78
Express "	6,483 78
Mail "	6,447 71
Interest "	6,137 35
	$557,862 05

DEFENDANTS' EXHIBIT 25. J. G. S., Ex'r.

(Put in evidence, page 223.)

Thirty-eighth Annual Report of the Directors of the Nashua and Lowell Railroad Corporation, Aug. 28, 1873.

Report.

(Page 3.)

The directors of the Nashua and Lowell railroad hereby submit to the stockholders their report for the year ending March 31, 1873.

Owing to the diminished business of Boston, resulting from the great fire of last November, and to the excessive expenditures caused by the past severe winter, the road has not been able to increase its net earnings in the usual ratio, yet it has saved the customary dividends.

The gross earnings were	$603,395 44
The expenditures were	521,134 48
	$82,260 96

Two semi-annual dividends of five per cent. each have been paid, amounting to $80,000.00, and the balance, $2,260.96, has been carried forward.

We may congratulate you that under the adverse circumstances of the season the customary dividends have been earned and paid without encroaching upon the surplus fund.

454 (Page 4.)

Our earnings are derived from a varied and somewhat extensive net-work of interests. Under the joint contract of partnership with the Boston & Lowell railroad we operate in common and are interested to the extent of thirty-one per cent. in the receipts and expenditures of one hundred and fifteen miles of railroad, viz:

The Boston and Lowell road, with its Woburn, Stoneham, Lexington, and Mystic Branches	42 miles.
The Nashua and Lowell road	14 "
" Wilton	15 "
" Stony Brook	13 "
" Lowell and Lawrence	13 "
" Salem and Lowell	18 "
Total	115 "

This mileage is expected to be increased by the opening, during this season, of the Middlesex Central road, an extension of the Lexington Branch through Bedford to Concord, Mass., a distance of eight miles, and of the Peterborough road, an extension of the Wil-

ton through Lyndeborough to Greenfield—ten miles—bringing the miles of road to be operated next season up to one hundred and thirty-three.

To illustrate the steady growth of business upon these several roads we append a tabular statement of receipts, miles run, and passengers and tons transported in each year since 1862.

The increase of gross receipts is from $201,000 to $603,000, or 200 per cent.

The increase of passengers carried one mile is from three millions to eleven millions, and the increase of freight is nearly 200 per cent.

(Page 5.)

In offset to this great growth of business our expenses have been increased by running more than twice as many miles to accommodate it, the cost of labor and material has been enhanced, and the prices of transportation have been reduced. A public demand is thus met that, beyond the assurance of reasonable returns
455 upon your investment, the advantages of large public patronage shall inure to the patrons themselves in the form of more frequent and cheaper accommodations.

The enlargement of our business has required a corresponding increase of equipment. Within the last eight years this company has purchased six locomotives, ten passenger and baggage cars, and eighty-five freight cars, and now holds so much more equipment than it did in 1865.

In view of the wants of the coming season the joint roads have now under contract, and being delivered, an additional equipment, to cost about one hundred thousand dollars.

From 1850 to 1867 the capital stock of this company was $600,000. It was increased in 1868 to $720,000, and in 1872 to $800,000. The total increase of $200,000 is represented by purchases in Boston and Charlestown, as heretofore authorized by the stockholders, by the second track between depots at Nashua, raising track at Tyngsboro', and by some portion of the additional equipment above referred to.

The Boston freight property stands on our books at	$95,325 00
The Mystic property, amount paid	48,670 36
New equipment	31,000 00
Second track and lands at Nashua	23,768 08
Raising track at Tyngsboro'	30,000 00
	$228,763 44

The increase of capital is thus fully accounted for, besides which

(Page 6.)

something has been paid out from the surplus earnings.

These new properties are actively used and occupied, are indispensable to the present business, and may therefore be considered as good as any part of our investment.

At Lowell the freight business has outgrown the present accommodations, and the directors of the Boston & Lowell road propose that a union depot and yard tracks be constructed for the accommodation of both roads. The only suitable locality for the purpose being on and adjoining our premises, between School street and the Western avenue, the title to the new structures should be
456 held by this company. The estimated expenditure required for this purpose is about one hundred thousand dollars, the interest upon which will be paid by the united roads.

For this purpose and for such enlargement of equipment and increase of yard grounds and tracks as the growing business may from time to time demand, we are of opinion that a larger investment is required than the present limit of our capital allows, and that a fair return may reasonably be expected on such expenditures as are made necessary by the greater business to be done. We therefore recommend that, at the annual meeting, authority be granted to issue bonds of this company to an amount not exceeding $200,000, to be disposed of at not less than par, from time to time, as the expenditures for new improvements may require.

Respectfully submitted by—

F. B. CROWNINSHIELD,
ONSLOW STEARNS,
DAN'L S. RICHARDSON,
HENRY SIGOURNEY,
EDWARD SPALDING,
Directors.

(Page 7.)

Report of the Auditing Committee.

The undersigned have examined the books and accounts and cash statements of the treasurer of the Nashua and Lowell Railroad Corporation for the year ending with March 31, 1873, and find the same clearly expressed and all payments properly vouched.

B. B. WHITTEMORE,
HIRAM M. GOODRICH,
Auditing Committee of Stockholders.

457 (Page 8.)

Business Account from 1863 *to* 1873.

	Receipts.	No. passengers, one mile.	Tons freight, one mile.	Miles run.
1863	$201,435 27	3,244,115	2,898,741	148.515
1864	241,422 81	3,896,570	3,215,163	167.154
1865	300,994 03	5,069,622	3,145,999	185.647
1866	407,799 49	5,757,024	4,400,612	198.815
1867	440,828 86	6,619,549	5,296,200	215.731
1868	432,847 85	6,752,429	5,415,670	219.542
1869	444,923 87	7,042,834	5,289,878	218.807
1870	488,587 15	8,350,778	5,539,930	236.032
1871	513,381 65	7,499,849	5,191,427	224.938
1872	557,862 05	10,567,000	7,080,052	299.980
1873	603,395 44	11,486,699	7,931,351	333.354

(Page 9.)

Balance-Sheet, April 1, 1873.

Dr.

Road-bed and real estate	$379,678 39
Superstructure	161,418 48
Buildings and bridges	119,265 05
Engines	63,000 00
Passenger cars	28,300 00
Merchandise cars	53,106 16
Material charged to B. & L. and N. & L. roads	67,077 67
Notes receivable	66,500 00
Cash on deposit	74,632 39
Mystic River quay	91,295 36
	$1,104,273 50

Cr.

Capital stock	$800,000 00
Unclaimed dividends	1,087 00
Renewals on road and buildings	45,000 00
Dividend No. 69 declared	40,000 00
Suspense account	17,705 83
Contingent fund	127,855 67
Boston & Lowell R. R.	43,625 00
Notes payable	30,000 00
	$1,104,273 50

458 (Page 10.)

Contingent Fund in Account Current for Year Ending March 31, 1873.

DR.

Balance—working materials, notes, and cash	$127,855 67

CR.

Balance brought forward from last year	$125,594 71
By earnings	2,260 96
	$127,855 67

(Page 11.)

Income and Expense Account for Year Ending March 31, 1873.

DR.

Repairs, road	$91,897 94
" engines	25,601 24
" freight cars	20,826 40
" passenger cars	18,381 57
" fences and houses	14,633 46
" bridges	16,191 06
" depots	7,442 09
Fuel	62,616 52
Oil and waste	9,864 34
Enginemen and firemen	27,648 18
Conductors and brakemen	17,607 03
Merchandise and depot expenses	53,374 75
Stationmen	12,472 92
Switchmen and gatemen	11,991 93
Office expenses	6,376 87
Miscellaneous expenses	12,753 48
Advertising and stationery	4,543 08
Taxes and insurance	24,747 21
Damages and gratuities	12,988 87
Rent	51,806 20
Ice and snow	3,265 34
Wilton railroad	14,104 00
Dividends, ten per cent.	80,000 00
Contingent fund	2,260 96
	$603,395 44

459 CR.

Freight receipts	$327,963 52
Passenger "	258,164 60
Express "	9,488 46
Mail "	2,937 72
Interest "	4,841 14
	$603,395 44

DEFENDANTS' EXHIBIT 26. J. G. S., Ex'r.

(Put in evidence, page 223.)

Thirty-ninth Annual Report of the Directors of the Nashua and Lowell Railroad Corporation, May 27, 1874.

Report.

(Page 3.)

The directors of the Nashua and Lowell railroad hereby submit to the stockholders their report for the year ending March 31, 1874:

Receipts.

From freight		$330,923 10
" passengers		257,966 01
" express		9,389 80
" mails		3,516 93
" interest		3,083 46
" contingent fund		8,517 41
Total		$613,396 71

Expenses.

For repairs of road		$81,290 41
" " " engines		22,501 05
" " " freight cars		19,559 11
" " " passenger cars		19,563 24
" " " fences and houses		9,992 07
" " " bridges		15,650 55

(Page 4.)

" " " depots		5,309 15
" fuel		69,643 08
For oil and waste		9,368 23
460 For enginemen and firemen		29,252 98
" conductors and brakemen		21,653 77
For merchandise and depot expenses		56,320 34
" stationmen		13,270 17
" switchmen and gatemen		14,394 19
" office expenses		6,006 47
" miscellaneous expenses		15,896 40
" advertising and stationery		5,211 99
" taxes and insurance		24,885 33
" damages and gratuities		4,908 73
" rents		81,973 81
" removing ice and snow		2,951 18
" interest on gold bonds		3,794 46
" dividends, 10 per cent		80,000 00
		$613,296 71

On the first of August last the Middlesex Central road was opened from Lexington to Concord, Mass., eight miles, and on the first of January the Peterborough road was opened from Wilton to Greenfield, eleven miles. The business from these extensions has been fully as great as was anticipated, for the season of the year that they have been in operation, and an increase of income may be expected from them in the summer months.

Our roads have, in common with all others, felt the effects of the business panic of last fall. The growth of traffic has been temporarily checked, but there seems reason to hope that it will soon resume its accustomed progress, and that your investments will continue to yield adequate returns.

(Page 5.)

The lines now operated by this company, in connection with the Boston & Lowell Railroad Company, have an aggregate length of one hundred and thirty-five miles, viz:

The main line, Nashua to Boston	40	miles.
Mystic River Branch	2	"
Lexington Branch	16	"
Woburn Branch	2	"
461 Stoneham Branch	3	"
Lowell & Lawrence railroad	13	"
Salem & Lowell railroad	20	"
Stony Brook railroad	13	"
Wilton and Peterboro' railroads	26	"
Total	135	"

For a detailed statement of work done, in extensions and new structures during last year, up to November 24th, reference may be had to the report of the manager to the railroad commissioners of Massachusetts, published in the appendix hereto.

Respectfully submitted by—

F. B. CROWNINSHIELD,
ONSLOW STEARNS,
DAN'L S. RICHARDSON,
EDWARD SPALDING,
Directors.

(Page 6.)

Report of the Auditing Committee.

The undersigned have examined the books and accounts and cash statements of the treasurer of the Nashua and Lowell Railroad Corporation for the year ending with March 31st, 1874, and find the same clearly expressed and all payments properly vouched.

B. B. WHITTEMORE,
HIRAM M. GOODRICH,
Auditing Committee of Stockholders.

(Page 7.)

Balance-Sheet, April 1, 1874.

DR.

Road-bed and real estate	$373,616	14
Superstructure	161,418	48
Buildings and bridges	119,265	05
Engines	53,000	00
Passenger cars	19,300	00
Merchandise cars	41,106	16
Material charged to Boston and Lowell and Nashua and Lowell roads	65,150	83
462 Notes receivable	186,000	00
Cash on deposit	107,346	82
Mystic River quay	131,654	88
Lands in Lowell and Nashua	33,396	50
Lowell improvements	46,852	49
New rolling stock	72,013	74
	$1,410,121	09

CR.

Capital stock	$800,000	00
Unclaimed dividends	552	00
Renewals on road and buildings	45,000	00
Dividend No. 71, declared	40,000	00
Suspense account	17,705	83
Contingent fund	119,338	26
Boston and Lowell railroad	27,125	00
Notes payable	160,400	00
Gold bonds	200,000	00
	$1,410,121	09

(Page 8.)

Contingent Fund in Account Current for Year Ending March 31, 1874.

DR.

Transferred to income account	$8,517	41
Balance, working materials, notes, and cash	119,338	26
	$127,855	67

CR.

Balance brought forward from last year	$127,855	67

(Page 9.)

Income and Expense Account for Year Ending March 31, 1874.

DR.

Repairs, road	$81,290	41
" engines	22,501	05
" freight cars	19,559	11
" passenger cars	19,563	24
Repairs, fences and houses	9,992	07
463 " bridges	15,650	55
" depots	5,309	15
Fuel	69,643	08
Oil and waste	9,368	23
Enginemen and firemen	29,252	98
Conductors and brakemen	21,653	77
Merchandise and depot expenses	56,320	34
Stationmen	13,270	17
Switchmen and gatemen	14,394	19
Office expenses	6,006	47
Miscellaneous expenses	15,896	40
Advertising and stationery	5,211	99
Taxes and insurance	24,885	33
Damages and gratuities	4,908	73
Rent	81,973	81
Ice and snow	2,951	18
Dividends, ten per cent.	80,000	00
Interest on gold bonds	3,794	46
	$613,396	71

CR.

Freight receipts	$330,923	10
Passenger "	257,966	01
Express "	9,389	80
Mail "	3,516	93
Interest "	3,083	46
Contingent fund	8,517	41
	$613,396	71

(Page 12.)

BOSTON, LOWELL AND NASHUA RAILROAD OFFICE,
BOSTON, *Nov.* 24, 1873.

To the board of railroad commissioners.

GENTLEMEN: In compliance with the request expressed in your circular of Oct. 1st for a statement of work done during the past year in "extensions, branches, terminal facilities, new or im-
464 proved local stations, new tracks and sidings," etc., the following memorandum is submitted on behalf of the Boston and Lowell and Nashua and Lowell railroads:

Extensions and Branches.

The Lexington Branch has been extended to Lexington, through Bedford, to Concord, eight miles, and trains commenced running through in August last. This extension was built by the Middlesex Central Railroad Company, and has been leased to the Boston and Lowell Railroad Corporation for thirty years. The branch is now sixteen miles long. It leaves the main line of the Lowell road at Somerville Centre, three miles from Boston. Commodious stations have been erected at Concord and Bedford, and one is now being finished at Arlington Heights. The depot at Lexington has also been rebuilt and improved.

The Wilton railroad, in New Hampshire, now operated as a branch of the Nashua and Lowell road, is being extended by the Peterborough Railroad Company about eleven miles, from Wilton to Greenfield. One-half the track is laid, the grading, masonry, and bridging

(Page 13.)

are entirely completed, buildings are in process of construction at Greenfield, and the balance of the track is being laid as fast as the season permits. It is expected that the road will be opened for business some time in December.* This extension has been leased to the Nashua and Lowell road for twenty years.

The Mystic River Branch of the Boston and Lowell road has been completed and put in operation during the year. It diverges from the main line at Milk Row Station, in Somerville, and extends across Charlestown Neck and down the Mystic river to its mouth, adjoining the navy yard. The length of this branch is two and one-quarter miles. At its terminus, on deep water of the open harbor, below Chelsea bridge, the company's solid wharf, of about seven acres, has been gravelled up to grade, numerous tracks laid upon it, and other preparations completed for its convenient use. Since June last the coal and other coastwise traffic has been done there instead
465 of at Boston and Cambridge, as heretofore. This wharf presents a harbor frontage of about fifteen hundred feet, around the greater portion of which the bottom has been dredged to admit vessels of twenty-three feet draft at low water. The pier band, of thirty-five feet in width, between the wall and this deep water is in process of construction. Above Chelsea bridge, upon the line of this branch, the lands of the company present a frontage of about half a mile on the south channel of the Mystic, and a width of four hundred feet. This frontage has been walled during the season for about one thousand feet in length, and the dredgings taken from below the bridge have been deposited behind it. The amount of land filled, in whole or in part, to eight feet above low water by these dredgings is about ten acres. The whole area to be filled is about twenty-three acres.

* The road was opened Jan. 1, 1874.

(Page 14.)

East Cambridge Terminal Grounds.

The freight grounds of the company at East Cambridge, used for lumber and other bulk freight destined to Boston, have been enlarged during the year by filling about one acre of flats. Five hundred feet in length of sea wall has [have] been built, and a bulkhead of wood, nine hundred feet long, has been constructed as a protection to the filling which is now being extended.

A large building has been fitted up on these grounds for a hay depot.

The brick round-house near the same point is being extended to shelter five additional locomotives.

New Stations.

The passenger station in Boston, which has been under construction during the past two years, is brought so near completion that it was opened for public use this morning. It occupies, with its approaches, an area of about three and one-fourth acres. The head-house has a frontage of two hundred and five feet on Causeway street and a depth of about one hundred and thirty feet. Two covered ways for carriages and footwalks pass under the flanking towers, and are now extended along the train-house sufficiently far for sheltered access to the train platforms. The main body of the head-house is devoted to waiting-rooms and passenger accommodations and to offices for the general staff of the company.

466

The train-house as now built is five hundred and thirty feet long and one hundred and twenty feet wide, having an iron ribbed, clear arch roof, springing from the foundations. Four tracks are laid in the train-house. The two principal platforms are each thirty-four feet wide. The design of the building contemplates the extension of the covered ways to the full length of the train-house and the

(Page 15.)

putting in of a track and platform under each, so that when completed there will be six lines of track in the building, each capable of admitting a train of about ten cars. The bridge approaches to the building have been fully completed.

A new freight station has been commenced at Lowell. The building is to be six hundred feet long and fifty-five feet wide, constructed of brick and stone. One-half of it is now being covered in. About one mile of shifting tracks are to be connected, the rails for which are purchased and on hand. The land required for the improvement has mainly been secured and paid for.

At Nashua several acres of land have been purchased for future increase of facilities at that point.

Facilities for Storage and Handling of Coal.

The Wilkes Barre Coal and Iron Company have erected commodious sheds and platforms upon our wharves at Charlestown and Salem for the storage of coal, and are laying in a stock for winter distribution. Contracts are made by them to deliver coal at a fixed price to customers on the line of our road, enabling purchasers to avoid all risks of demurrage and delays in transportation.

New Equipment.

During the year the shops of the company have been fully occupied with repairs and renewals of the rolling stock, in addition to which there have been purchased and put in use upon the road two locomotives, four passenger cars, two smoking cars, fifty short
467 box freight cars, and twenty long platform freight cars.
Automatic vacuum brakes have been placed on the larger part of our passenger equipment, and work is in progress for the balance.

(Page 16.)

New Tracks and Sidings.

Additional sidings and extensions have been put down on the Mystic wharf, at Boston and East Cambridge, at Milk Row, North Winchester, Stoneham, Woburn, South Wilmington, Lowell, Wilton, and at Lexington, amounting in all to about four miles.

Respectfully submitted, GEO. STARK, *Manager.*

DEFENDANTS' EXHIBIT 27. J. G. S., Ex'r.

(Put in evidence, page 223.)

Fortieth Annual Report of the Directors of the Nashua & Lowell Railroad Corporation, May 26, 1875.

Report.

(Page 3.)

The directors of the Nashua & Lowell Railroad Corporation submit to the stockholders their report for the year ending March 31, 1875:

Income and Expense Account for Six Months Ending Oct. 31, 1874.

DR.

Repairs, road		$46,876 50
"	engines	10,859 44
"	freight cars	10,045 91
"	passenger cars	10,929 60
"	fences and houses	6,873 35
"	bridges	2,939 30
"	depots	2,875 47

Fuel		$31,379 23
Oil and waste		3,735 74
	Enginemen and firemen	15,030 63
468	Conductors and brakemen	9,537 20
	Merchandise and depot expenses	27,961 34
Stationmen		7,425 53
Switchmen and gatemen		7,686 72
Office expenses		4,534 96
Miscellaneous expenses		11,162 21
Advertising and stationery		1,971 27
Taxes and insurance		17,027 09
Damages and gratuities		4,467 07
Rent		39,210 97
Ice and snow		10 70
Wilton railroad		7,750 00
Dividends, four per cent.		32,000 00
Interest account		695 37
Contingent fund		5,318 76
		$318,304 36

CR.

Freight receipts		$169,204 17
Passenger "		142,547 64
Express "		4,583 89
Mail "		1,968 66
		$318,304 36

(Page 4.)

Income and Expense Account for Six Months Ending March 31, 1875.

DR.

Repairs, road		$44,775 28
"	engines	13,175 94
"	freight cars	9,634 87
"	passenger cars	11,358 62
"	gates, fences, and houses	13,127 21
"	bridges	7,811 45
"	depots	6,253 92
Fuel		33,319 21
Oil and waste		4,760 26
Enginemen and firemen		14,370 64
	Conductors and brakemen	11,165 13
469	Merchandise and depot expenses	22,571 22
	Stationmen	7,535 62
Switchmen and gatemen		7,302 36
Office expenses		2,990 18
Miscellaneous expenses		8,452 75
Advertising and stationery		2,031 99
Taxes and insurance		11,455 81

Damages and gratuities	$1,182 16
Rent	38,710 68
Ice and snow	2,079 73
Interest	6,117 66
For adjustment of old joint-acc't balances as follows:	
Repair, shops	7,130 00
" roads	6,200 00
" bridges	6,200 00
" fences and houses	3,720 00
" engines	4,960 00
Central Vermont railroad, for adjustment under contract of losses to July 1, 1873, on business of Ogdensburg & Lake Champlain railroad and Northern Transportation Company	18,455 44
	$326,848 13

CR.

Freight receipts	$124,645 39
Passenger "	110,282 40
Express "	5,354 25
Mail "	2,001 36
Taken from contingent fund	84,564 73
	$326,848 13

(Page 5.)

Income and Expense Account for Year Ending March 31, 1875.

DR.

Repairs, road	$91,651 78
" engines	24,035 38
Repairs, freight cars	19,680 78
470 " passenger cars	22,288 22
" fences and houses	20,000 56
Repairs, bridges	10,750 75
" depots	9,129 39
Fuel	64,698 44
Oil and waste	8,496 00
Enginemen and firemen	29,401 27
Conductors and brakemen	20,702 33
Merchandise and depot expenses	50,532 56
Stationmen	14,961 15
Switchmen and gatemen	14,989 08
Office expenses	7,525 14
Miscellaneous expenses	19,614 96
Advertising and stationery	4,003 26
Taxes and insurance	28,482 90

Damages and gratuities	$5,649 23
Rent	77,921 65
Ice and snow	2,090 43
Dividend, four per cent.	32,000 00
Interest	6,813 03
Wilton railroad, 3½	7,750 00
For adjustment of old joint-acc't balances as follows:	
Repairs, shops	7,130 00
" road	6,200 00
" bridges	6,200 00
" fences and houses	3,720 00
" engines	4,960 00
Central Vermont railroad, for adjustment, under contract, of losses to July 1, 1873, on business of Ogdensburg & Lake Champlain railroad and Northern Transportation Company	18,455 44
	$639,833 73

CR.

Freight receipts	$293,849 56
Passenger receipts	252,830 04
471 Express receipts	9,938 14
Mail "	3,970 02
Taken from contingent fund	79,245 97
	$639,833 73

(Page 6.)

Balance-Sheet, April 1, 1875.

DR.

Road-bed and real estate	$343,616 14
Superstructure	161,418 48
Buildings and bridges	119,265 05
Engines	53,000 00
Passenger cars	19,300 00
Merchandise cars	41,106 16
Material charged to B. — L. and N. & L. railroads	73,720 40
Notes receivable	110,500 00
Cash and bank deposits	32,404 71
Mystic River quay	155,273 57
Construction and new equipment	203,606 65
Chas. E. A. Bartlett, cashier	30,000 00
Ogdensburg & Lake Champlain railroad bonds	25,000 00
Trustees of sinking fund for redemption of Ogdensburg & Lake Champlain R. R. bonds and Northern Transportation Company bonds	3,295 13
	$1,371,506 29

Cr.

Capital stock	$800,000 00
Gold bonds	200,000 00
Notes payable	285,900 00
Contingent fund	85,092 29
Unclaimed dividends	514 00
	$1,371,506 29

472 & 473 Defendants' Exhibit 28. J. G. S., Ex'r.

(Put in evidence, page 224.)

Circuit Court of the United States, District of Massachusetts. In Equity.

Nashua and Lowell Railroad Corporation
v.
Boston and Lowell Railroad Corporation *et al.* } No. 1386.

Notice.

To the Nashua and Lowell Railroad Corporation and to Francis A. Brooks, its solicitor of record:

You are hereby notified to produce before the examiner in this cause, to be used in evidence in the above-entitled cause, the books of the treasurer of the Nashua and Lowell Railroad Corporation, including all books of account of said Nashua and Lowell Railroad Corporation from Jan. 1, 1871, to Jan. 1, 1879, both dates inclusive, and all books kept by any treasurer of said Nashua and Lowell Railroad Corporation containing the accounts of the treasurer of said Nashua and Lowell Railroad Corporation for each year during said period; also all checks, receipts, vouchers, and statements of account in the hands of said corporation or any agent thereof touching the monthly reports and semi-annual settlements made during the joint management of the Boston and Lowell Railroad Corporation and the Nashua and Lowell Railroad Corporation during each of said years of 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879; also all records of meetings of the board of directors of the Nashua and Lowell Railroad Corporation belonging to said corporation from 1858 to 1878, both years inclusive, and the record of each meeting of said board of directors of each of said years.

Boston, Sept. 2, 1885.

BOSTON AND LOWELL RAILROAD CORPORATION,
By A. A. STROUT, *Its Attorney.*
A. A. STROUT,
Att'y of Record for B. & L. R. R. Corporation.

A true copy.
Attest: C. L. TILTON.

* * * * * * *

474 DEFENDANTS' EXHIBIT 30. J. G. S., Ex'r.

(Put in evidence, page 228.)

BOSTON, *Nov.* 26, 1867.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held at Boston on Tuesday, the twenty-sixth day of November, 1867, Messrs. Crowninshield, Sigourney, and Spalding were present.

The monthly statements of accounts were read.

The following communication from the president of the Stony Brook railroad was submitted:

"WESTFORD, *Oct.* 29, 1867.

Gen. G. Stark.

DEAR SIR: The committee of the Stony Brook R. R. directors chosen to meet any committee of the N. & L. R. R. in relation to a change of contract between the S. B. R. R. and the Nashua & Lowell R. R. are ready to meet at any time when agreeable. Will you please appoint a time, giving a few days' notice?

Respectfully yours, etc.,

(Signed) J. W. P. ABBOTT."

Whereupon it was—

Voted, That the president and manager, with Messrs. Richardson, of this board, and Minot, of the Boston and Lowell board, be a committee to confer with the directors of the Stony Brook railroad upon the subject of a modification of the contract for operating that road.

475 The manager reported a proposed reduction in the tariff, to go into effect on the 1st of January next, proof-sheets of which are to be completed and submitted for the action of the board at the next monthly meeting.

The subject of expresses was taken up, and after full discussion it was—

Voted, That the manager be authorized to make all needful arrangements for transacting the parcels business of this road in the name and on account of the company from and after the expiration of existing contracts with the express companies.

A communication from the president of the Concord railroad was read soliciting aid for the construction of the Mt. Washington railway, an enterprise now in progress for facilitating the ascent of the White Mountains, and which it is supposed will, when completed, induce an increase of summer travel over this road; and it was—

Voted, That the manager be authorized to contribute towards this purpose $3,000 from the joint funds of the Boston and Lowell and Nashua and Lowell roads.

The manager submitted a requirement of the United States Government for a bond relative to goods in transit through Canada from one point in the United States to another over this road and its connections, and it was—

Voted, That Geo. Stark, manager of the Boston and Lowell and Nashua and Lowell railroads, be authorized, in the name and on behalf of these corporations, to enter, jointly with the Concord, Northern, Vermont Central, Vermont and Canada and Montreal and Vermont Junction railroads, into a bond with the United States of America in the penal sum of $100,000, conditioned for the proper transportation and safe delivery of goods transported through Canada over their roads and that of the Grand Trunk Railway Company, for the due observance of the revenue laws of the United States and the regulations of the Treasury Department in connection therewith, for the payment to the United States of the salary of an inspector of customs at Montreal and for furnishing good and secure box cars and paying expenses necessary for furnishing the same with custom locks and seals, and to affix the corporate names and seals of said Boston and Lowell and Nashua and Lowell Railroad Corporations to said bond.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

476 DEFENDANTS' EXHIBIT 31. J. G. S., Ex'r.

(Put in evidence, page 228.)

BOSTON, *Sept.* 22, 1868.

The directors of the Nashua and Lowell railroad met at the manager's office, in Boston, on Tuesday, the twenty-second day of September, 1868, at 11 o'clock a. m.

Messrs. Crowninshield, Sigourney, and Richardson were present.

The monthly statement was read.

Voted, That the president and manager be a committee to negotiate with the Stoneham Branch Railroad Company in reference to a further lease of their road with power.

Voted, That Mr. Hosford be substituted for Mr. Minot, now absent from the country, on the committee appointed Nov. 26, 1867, to negotiate a new contract for operating the Stony Brook railroad.

Voted, That the application of A. P. Balch, contractor of the extension of the Passumpsic River road, for freight of his rails and supplies be referred to the manager with full powers.

The meeting then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 32. J. G. S., Ex'r.

(Put in evidence, page 229.)

BOSTON, *Sept.* 28, 1869.

(The records of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Sept. 28, 1869, is printed on pages 438 and 439 of this volume as Exhibit 16, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 33. J. G. S., Ex'r.

(Put in evidence, page 228.)

BOSTON, *Nov.* 23, 1869.

(The records of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Nov. 23, 1869, is printed on pages 364 to 367 of this volume, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

477 DEFENDANTS' EXHIBIT 34. J. G. S., Ex'r.

(Put in evidence, page 229.)

BOSTON, *Nov.* 27, 1869.

A special meeting of the directors of the Nashua and Lowell railroad, duly called, was held at the office of president, in Boston, on Saturday, the twenty-seventh day of November, 1869.

Messrs. Crowninshield, Spalding, Richardson, Stearns, and Sigourney were present.

The Boston and Lowell board were also in session.

The committee upon the purchase of the Lexington and Arlington railroad made a report, whereupon the Boston and Lowell board—

Voted, That, in anticipation of the purchase by this corporation of the franchise, road, and property of said Lexington and Arlington railroad, the treasurer be authorized to pay to the owners of stock of said Lexington and Arlington railroad the sum of $28,000 in cash, and to give to said owners the notes of this corporation on interest at the rate of six per cent. per annum, as follows:

One note for $12,006, payable in 60 days;
One note for $25,000, payable in 1 year;
One note for $25,000, payable in 2 years;
One note for $25,000, payable in 3 years;
One note for $25,000, payable in 4 years;

upon the transfer to F. B. Crowninshield and Geo. Stark, as trustees for this corporation, of 1,199 shares of the preferred stock of said Lexington and Arlington railroad and of 1,085 shares of the common stock of said corporation, and upon the agreement on the part of said owners to either convey to said trustees as aforesaid the remaining shares of the stock of said corporation or make the same good to said trustees, and upon the further agreement on the part of said owners that the franchise, road, and property of said Lexington and Arlington railroad shall be conveyed to this corporation, on demand, without further consideration.

Voted, That this company assent to the purchase of the Lexington and Arlington railroad by the Boston and Lowell railroad on terms above recited, and that the same be taken into joint account

under the general contract between the Boston and Lowell and Nashua and Lowell Companies.

The meeting was then dissolved.

Attest: GEORGE STARK, *Clerk.*

478 DEFENDANTS' EXHIBIT 35. J. G. S., Ex'r.

(Put in evidence, page 229.)

BOSTON, *Dec.* 28, 1869.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Dec. 28, 1869, is printed on page 439 of this volume as Exhibit 18, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 36. J. G. S., Ex'r.

(Put in evidence, page 229.)

BOSTON, *Jan.* 25, 1870.

The directors of the Nashua and Lowell Railroad Corporation met at the manager's office, in Boston, on Tuesday, the twenty-fifth day of January, 1870, at eleven o'clock a. m.

Present: Messrs. Crowninshield, Spalding, and Sigourney.

The monthly statements were presented and reports made upon the applications to the Legislature for the Mystic River and Lexington and Arlington connection charters.

The committee appointed Nov. 23 last to negotiate contracts with the northern connecting roads reported a draft for a contract with the Concord, Northern, and Vermont Central roads for business to, from, and beyond the Vermont Central road for a term of twenty years, and, the same having been read, the said committee were by vote authorized to conclude a contract upon the general basis of the draft.

Mr. Sigourney, of this board, and Mr. Codman, of the Boston and Lowell board, were made a committee to arrange a contract between the Boston and Lowell and Nashua and Lowell roads relative to the purchase and operation of the Lexington and Arlington railroad and its extension and of the Stoneham Branch railroad.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

479 DEFENDANTS' EXHIBIT 37. J. G. S., Ex'r.

(Put in evidence, page 229.)

BOSTON, *May* 24, 1870.

At a meeting of the directors of the Nashua and Lowell railroad held at the manager's office, in Boston, on Tuesday, the twenty-fourth day of May, 1870, Messrs. Crowninshield, Richardson, and Sigourney were present. The monthly statements were presented.

Messrs. Sigourney, of this board, and Codman, of the Boston and Lowell board, a joint committee appointed Jan. 25, 1870, to arrange a contract between the Boston and Lowell and Nashua and Lowell roads relative to the purchase and operation of the Lexington and Arlington railroad and its extension and of the Stoneham Branch railroad, reported a draft of contract for that purpose, which was read and approved, and the same committee was authorized and directed to execute the same on behalf of the respective corporations.

A communication from a committee of the town of Winchester relative to improved station accommodations in that town having been read, it was—

Voted, That the president and Mr. Hosford, of the Lowell and Boston board, and the manager be a committee to view the premises and confer with the said town committee upon the subject of their wants.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 38. J. G. S., Ex'r.

(Put in evidence, page 229.)

BOSTON, *July* 26, 1870.

At a meeting of the directors of the Nashua and Lowell Railroad Corporation held in Boston July 26, 1870, at eleven o'clock a. m., Messrs. Crowninshield, Sigourney, and Richardson were present.

The monthly statements and reports of the manager were submitted.

Voted, That the manager be authorized to purchase of the Lowell Gas-Light Company a strip of their land between Willey street and Pawtucket canal, as shown on a plan now submitted, containing about five thousand square feet, at a rate not exceeding twenty-five cents per foot.

480 Voted, That the manager be authorized to erect a new grain elevator at the Boston freight station, at a cost not exceeding $50,000, from the joint funds of the Boston and Lowell and the Nashua and Lowell Railroad Corporations.

Voted, That the manager be directed to pay the sum of $8,750, due under the lease of the Salem and Lowell Railroad Company on the fifteenth day of August next, in gold or its equivalent.

Voted, That Mr. Crowninshield, Judge Abbott, and the manager be a committee with authority to contract for the building of the railroad to connect the Boston and Lowell railroad with the Lexington and Arlington railroad.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 39. J. G. S., Ex'r.

(Put in evidence, page 229.)

BOSTON, *Oct.* 25, 1870.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date is printed on page 440 of this volume as Exhibit 19, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 40. J. G. S., Ex'r.

(Put in evidence, page 229.)

BOSTON, *Dec.* 27, 1870.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Dec. 27, 1870, is printed on pages 440 and 441 of this volume as part of Exhibit 20, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 41. J. G. S., Ex'r.

(Put in evidence, page 230.)

BOSTON, *Jan.* 24, 1871.

(The record of the doings of the directors of the Nashua and Lowell railroad Corporation on the above date, Jan. 24, 1871, is printed on pages 441 and 442 of this volume as part of Exhibit 20, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

481 DEFENDANTS' EXHIBIT 42. J. G. S., Ex'r.

(Put in evidence, page 230.)

BOSTON, *Feb.* 6, 1871.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Feb. 9, 1871, is printed on pages 372 and 373 of this volume, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 43. J. G. S., Ex'r.

(Put in evidence, page 230.)

BOSTON, *Feb.* 20, 1871.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Feb. 20, 1871, is printed on pages 443 to 445 of this volume as Exhibit 22, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 44. J. G. S., Ex'r.

(Put in evidence, page 230.)

BOSTON, *Sept.* 26, 1871.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, Sept. 26, 1871, is printed on page 445 of this volume as part of Exhibit 23, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 45. J. G. S., Ex'r.

(Put in evidence, page 230.)

BOSTON, *Nov.* 28, 1871.

At a meeting of the directors of the Nashua and Lowell railroad held at the manager's office, in Boston, on Tuesday, the twenty-eighth day of November, 1871, at eleven a. m., Messrs. Crowninshield, Spalding, and Sigourney were present.

The monthly statements and accounts were presented.

482 The question of the extension of the Wilton railroad being under discussion, it was—

Voted, That Messrs. Crowninshield, of this board, and Abbott, of the Boston and Lowell railroad board, and the manager be a committee to negotiate with the Peterboro' Railroad Company for the construction and lease of their road to Greenfield.

The manager reported that the several towns on the line of the proposed extension of the Lexington road were taking action in the matter of voting aid for such extension, and it was—

Voted, That the committee on the extension of the Lexington and Arlington road be authorized and requested to continue their negotiations with the Middlesex Central road and to prepare, for the action of the stockholders at the annual meeting, agreements or contracts relating to the construction of said road, provided a satisfactory arrangement can be concluded.

A petition from Susan A. Sullivan for aid, in consequence of an accident to and death of her husband (Michael Sullivan), was referred to the manager, with full powers.

An application from Wm. A. Agnew for aid, in consequence of an accident to him, was referred to the manager.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 46. J. G. S., Ex'r.

(Put in evidence, page 230.)

BOSTON, *Dec.* 26, 1871.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the manager's office, in Boston, on Tuesday, the twenty-

sixth day of December, 1871, Messrs. Crowninshield, Spalding, and Sigourney were present.

The monthly accounts were presented.

Messrs. Richardson, of this board, and Codman, of the Boston and Lowell board, and the manager were appointed a committee with reference to a new contract for the use of Phillips' wharf, at Salem.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

483 DEFENDANTS' EXHIBIT 47. J. G. S., Ex'r.

(Put in evidence, page 230.)

BOSTON, *Jan.* 23, 1872.

At a meeting of the directors of the Nashua and Lowell railroad held at the manager's office, in Boston, on Tuesday, the twenty-third day of January, 1872, at 11 o'clock in the forenoon, the full board was present.

The manager submitted his monthly accounts.

Messrs. Spalding and Sigourney were appointed a committee on behalf of this board to confer with a committee of the Boston and Lowell board with reference to what interest, if any, by deed, lease, or otherwise, the Nashua and Lowell road shall take in the new passenger depot in Boston, the Mystic River railroad, and other property or extensions not embraced in contracts already made between the two corporations.

The subject-matter of a letter from Josiah Quincy, suggesting furnishing free passes for three years to some twenty-five persons, heads of families, who may build houses on the line of the road near Medford Steps, was referred to the manager.

Mr. Richardson, of this board, Mr. Hosford, of the Boston and Lowell board, and the manager were made a committee to conclude a traffic contract with the Passumpsic Railroad Company.

The application of Mr. Agnew for further aid was rejected.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 48. J. G. S., Ex'r.

(Put in evidence, page 231.)

BOSTON, *May* 28, 1872.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, May 28, 1872, is printed on page 446 of this volume as part of Exhibit 23, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

484 DEFENDANTS' EXHIBIT 49. J. G. S., Ex'r.

(Put in evidence, page 231.)

BOSTON, *July* 23, 1872.

(The record of the doings of the directors of the Nashua and Lowell Railroad Corporation on the above date, July 23, 1872, is printed on pages 447 and 448 of this volume as part of Exhibit 23, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 50. J. G. S., Ex'r.

(Put in evidence, page 231.)

BOSTON, *Oct.* 22, 1872.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the manager's office, in Boston, on Tuesday, the twenty-second day of October, 1872, Messrs. Crowninshield, Spalding, Richardson, and Sigourney were present.

The semi-annual accounts were presented, and it was—

Voted, That a dividend of five per cent., free of taxes, be made, payable, on the first day of November, to holders of stock at the close of business of this day.

The manager and Messrs. Richardson, of this board, and Hosford, of the Boston and Lowell board, were appointed a committee to purchase lands in Lowell for approaches to the contemplated new freight-house.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 51. J. G. S., Ex'r.

(Put in evidence, page 231.)

BOSTON, *Nov.* 26, 1872.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the manager's office, in Boston, on Tuesday, the twenty-sixth day of November, 1872, Messrs. Crowninshield, Richardson, Spalding, and Sigourney were present.

The statement of earnings and expenditures of the month of October was read.

485 The manager made an elaborate verbal report upon the comparative business operations of the past year and the financial condition and the relations of the joint roads to the various investments.

He also reported the substance of an agreement with the Massachusetts Central railroad for the use by them of certain parts — termi-

nal facilities in Boston and elsewhere and the tracks of the Boston and Lowell road to the Lexington Branch.

The president of the Boston and Lowell road was authorized to execute such agreement.

A communication was received from the citizens' committee for the relief of sufferers from the late fire in Boston asking a contribution in aid of such sufferers, and it was—

Voted, That the manager be authorized and directed to contribute one thousand dollars from the funds of the joint roads.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 52. J. G. S., Ex'r.

(Put in evidence, page 231.)

BOSTON, *Sept.* 16, 1873.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the president's office, No. 60 State street, on Tuesday, the sixteenth day of September, 1873, Messrs. Crowninshield, Spalding, Richardson, and Sigourney were present.

After some discussion upon Peterborough railroad matters it was—

Voted, That this corporation loan to the Peterborough Railroad Company the sum of $150,000, payable on the first day of January, 1875, with interest, on the note of the said Peterborough Railroad Co., secured by the pledge of 1,500 shares of the capital stock of said Peterborough Railroad Company, on condition that at least fifteen responsible persons shall file an agreement with this corporation to purchase said 1,500 shares of stock of this corporation on or before said Jan. 1, 1875, provided said loan shall not then be paid or said stock previously sold by this corporation.

The meeting was then dissolved.

Attest: EDWARD SPALDING,
Clerk pro tem.

486 DEFENDANTS' EXHIBIT 53. J. G. S., Ex'r.

(Put in evidence, page 231.)

BOSTON, *Nov.* 25, 1873.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the passenger station at Boston, on Tuesday, the twenty-sixth of November, 1873, Messrs. Crowninshield, Spalding, and Richardson were present.

A report to the railroad commissioners detailing the progress of new work and improvements during the year was presented, and the manager was requested to print the same as an appendix to the report of the Boston and Lowell road.

* * * * * * *

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 54. J. G. S., Ex'r.

(Put in evidence, page 231.)

BOSTON, *July* 28, 1874.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the manager's office, in Boston, on Tuesday, the twenty-eighth day of July, 1874, Messrs. Crowninshield, Richardson, Stearns, and Bailey were present.

The monthly statement of earnings and expenses was read.

A communication from the board of railroad commissioners on the subject of restricting the use of locomotive whistles —; after discussion reply was left to discretion of the manager.

Voted, That the president and manager, with Messrs. Richardson and Bailey, and Abbott, of Boston and Lowell board, be a committee to consider the best manner to bring about a union of the Boston and Lowell and Nashua and Lowell Railroad Corporations according to the acts passed by the Legislatures of Massachusetts and New Hampshire.

Voted, That the same be a committee to consider the subject of the proposed branch from Wilmington to Lawrence, with authority to build said branch if deemed expedient.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

487 DEFENDANTS' EXHIBIT 55. J. G. S., Ex'r.

(Put in evidence, page 231.)

BOSTON, *Sept.* 29, 1874.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the manager's office, in Boston, on Tuesday, the twenty-ninth day of September, 1874, Messrs. Crowninshield, Stearns, Spalding, and Bailey were present.

Gen. Butler came before the board with reference to the claim of J. G. Webster for land taken on Western Ave., in Lowell, for the approach to the new freight depot. The subject of the adjustment of his claim was referred to Messrs. Crowninshield and Richardson, of this board, and Mr. Hosford, of the Boston and Lowell board.

The monthly statements were presented.

The manager submitted a printed copy of a new passenger tariff, to go into effect Oct. 1, 1874, which was approved and ordered to be endorsed by the clerk and placed on file.

A proposal from the Middlesex Central Railroad Co. to sell their road was referred to the next monthly meeting.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 56. J. G. S., Ex'r.

(Put in evidence, page 232.)

BOSTON, *Nov.* 24, 1874.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the manager's office, in Boston, on Tuesday, the twenty-fourth day of November, 1874, at 11 o'clock a. m., Messrs. Crowninshield, Richardson, Spalding, and Bailey were present.

The monthly statement was submitted.

The manager read a draft of contract with the Boston and Maine Railroad Co. relative to establishing equal rates between Boston and Lowell and Boston and Lawrence and Lowell and Lawrence, and the use of terminal facilities and tracks at Lowell and Lawrence, and it was—

488 Voted, That he be authorized to execute the same on behalf of this Co.

Voted, That the manager be instructed to notify all persons employed by this Co. that in future no gratuities would be made them on account of personal injuries, and to advise them to protect themselves against risk in the service by insuring in some sound accident insurance company.

The meeting was then dissolved.

Attest: GEO. STARK, *Clerk.*

DEFENDANTS' EXHIBIT 57. J. G. S., Ex'r.

(Put in evidence, page 232.)

BOSTON, *March* 23, 1875.

At a meeting of the directors of the Nashua and Lowell Railroad Co. held at the manager's office, in Boston, on Tuesday, March 23, at 11 o'clock in the forenoon, Messrs. Crowninshield, Bailey, Stearns, and Richardson were present.

The manager read statement of the receipts and expenditures for February; also a comparative statement of rates of fare and freight' running expenses, and repairs with those of eight roads running from Boston, individually and by average.

The manager read statement (prepared at the request of the president) of the general history and present condition of the combined roads and branches, with suggestions regarding future policy, and on motion of Mr. Richardson it was—

Voted, That the report of the manager and the accompanying documents be placed on file.

The manager reported his action under the direction of the committee on the change in season and mileage tickets appointed at the special meeting, March 10.

Mr. Richardson, from the committee, read a portion of the con-

tract with the Boston and Maine railroad and stated the questions involved in the proposed change, and it was—

Voted, That on account of objections made by the Boston and Maine R. R. Co. an exception be made from the vote passed Feb. 23, 1875, as regards season tickets between Lowell and Lawrence, Boston and Lowell, and Boston and Lawrence, and—

489 Voted, To restore the mileage tickets as they were at the time the contract was made with the Boston and Maine Railroad Company, except between Lowell and Lawrence, Boston and Lowell, and Boston and Lawrence.

On motion of the manager, it was—

Voted to discontinue the sale of package tickets.

Mr. Stearns, from the committee on express business, appointed at the special meeting of March 10, 1875, read a report, and it was—

Voted, That the report be accepted, the recommendations therein adopted, and the report placed on file.

The manager stated what new express arrangements could be made and read the draft of agreement with R. D. Blinn, of Lexington, concerning the running of an express to Concord and way stations on the Concord Branch, and it was—

Voted to authorize the manager to make a contract with Blinn substantially as read at this meeting, care being taken to avoid all liability to any claim for damages.

The manager then read the privileges proposed to be granted to other parties making offers to secure the express business, and on motion it was—

Voted, That Messrs. Hosford and Stark, of the Lowell board, and Stearns, of this board, be authorized to conclude bargains with the various expresses and to close the "fast freight" and "parcel delivery" departments now in operation.

Mr. Burke, of the Boston and Lowell board, read report of the committee appointed at the special meeting of March 10, 1875, to examine certain amounts standing charged on the books of the corporation, and the report was laid on the table for further consideration.

The manager read lease to be made to Jacob Hittinger of land on the Stony Brook railroad at Forge Pond, now occupied in part by his ice-houses, and it was—

Voted, That the president be authorized to execute the same.

After an extended discussion concerning the present condition and prospects of the corporation, especially in regard to its relations with the Middlesex Central and Peterborough roads, the meeting dissolved.

Attest: GEO. STARK, *Clerk.*

490 DEFENDANTS' EXHIBIT 58. J. G. S., Ex'r.

(Put in evidence, page 232.)

BOSTON, *July* 27, 1875.

The directors of the Nashua and Lowell Railroad Corporation, agreeably to previous notice, met at the manager's office, in Boston, this day.

Present: Messrs. Crowninshield, Richardson, Stearns, Bailey, and Lowell.

The president read the monthly statement of receipts and expenditures.

Voted, That the subject of how the expenses incurred in rebuilding the railroad bridge at Lowell shall be charged be referred to Mr. Hosford, of the Boston and Lowell road, and to Mr. Richardson, of the Nashua and Lowell road, to report at the next meeting.

The president presented the report of Mr. W. F. Salmon, the auditor employed by the committee appointed for that purpose.

Voted, That the report be placed on file.

Voted, That the matter of shortages in the accounts of Mr. Woods, the treasurer of the road, be referred to the finance committee, and that they be authorized to charge it off if they see fit.

Voted, That the matter of arrearages in station agents' accounts be referred to the manager, with instruction to collect what he can, and report at a future meeting.

On motion of Mr. Lowell—

Voted, That the subject of the drafts of agreements reported by the committee on unfinished contracts lie upon the table.

Mr. Richardson, in behalf of the committee appointed to see whether any improvement can be made in this board's method of exercising control over the roads, reported that the committee asked to be discharged from further consideration of the subject.

On motion of Mr. Lowell—

Voted, That the committee be so discharged.

Voted, That the finance committee be instructed to make a monthly examination of the accounts and vouchers of payments and expenses of this road, and also of the joint roads.

Voted, That the account this day rendered of Mr. Wood,
491 as treasurer of the road, for his services as treasurer for the year ending March 31, 1875, be approved.

Voted, That the salary of Mr. Wood, as treasurer of this road and for services as treasurer of the Wilton and Peterborough roads, be fixed at the sum of $720 from and after March 31, 1875.

Voted, To adjourn.

A true record.

Attest: W. W. BAILEY, *Clerk.*

* * * * * * *

492 DEFENDANTS' EXHIBIT 61. J. G. S., Ex'r.

(Put in evidence, page 235.)

Month of October, 1878.

Statement of Joint Income and Expenses, Boston & Lowell and Nashua & Lowell Railroad Corporations.

DR.

	Oct. proper.	Exp. previous to Oct.	Total Oct., 1878.	1877.
Salaries and expenses, general office	$3,321 08	$35 16	$3,356 24	$4,665 06
Taxes—State, local		2,800 03	2,800 03	2,691 69
Insurance premiums and loss by fire	600 00		600 00	600 00
Telegraph expenses	197 50	18 00	215 50	197 50
Total general expenses:				
Repairs, road-bed and track	12,102 66	125 38	12,228 04	9,850 53
Repairs, bridges	728 31	1,006 50	1,734 81	420 21
Repairs, buildings	1,548 86	419 08	1,967 94	2,907 22
Repairs, shops and machinery	385 29		385 29	271 78
Repairs—fences, road crossings, and signs	611 09	2 25	613 34	247 53
Repairs, locomotives	4,644 07	11 40	4,655 47	3,532 76
Repairs, snow-plows				21 80
Steel rails laid	4,193 67		4,193 67	
Iron rails laid				
Ties laid	1,556 44		1,556 44	1,193 92
Removing ice and snow				
Water and water stations	39 67	8 00	47 67	289 98
Fuel, locomotives and cars	10,517 48		10,517 48	11,870 53
Fuel, stations and shops	1,610 43		1,610 43	1,459 36
Train lubricating and waste	1,138 54	1 00	1,139 54	1,511 92
Switch, watch, flag, and signal service	5,446 65	545 36	5,992 01	5,320 79
Electric signals	64 15		64 15	99 27
New locomotives				
New snow-plows				
Total maintenance & movement:				
Repairs—passenger, baggage, and mail cars	3,485 82		3,485 82	3,470 77
Passenger train operation	7,778 26	1,382 76	9,161 02	8,440 29
Passenger station and gen'l pass. expenses	4,075 34	90 22	4,165 56	3,802 36
Passenger damage and gratuities				183 58
New passenger, baggage, and mail cars				
Advertising	159 20	141 22	300 42	16 50
Peterboro' stage line	446 35	28 00	474 35	509 98
Total pass. traffic expense:				
Repairs, freight cars	2,199 99	10 95	2,210 94	3,100 07
Freight train operation	6,199 94	468 25	6,668 19	6,273 40
Freight station and general freight expense	9,002 51	433 72	9,436 23	8,603 73

Statement of Joint Income and Expenses, &c.—Continued.

	Oct. proper.	Exp. previous to Oct.	Total Oct., 1878.	1877.
Freight damage and gratuities	7 00	30 10	37 10	78 02
New freight cars				
Foreign road mileage		1,254 55	1,254 55	1,132 62
Line car mileage		636 14	636 14	33 76
493 Total freight traffic expense:				
Custom-work account				
Freight account				
Passenger account				
Rent account	933 33		933 33	533 33
Mail account				
Total miscellaneous expense	$82,994 63	$9,448 07	$92,441 70	$83,330 56

CR.

	1878.	1877.
Passenger account	$78,901 38	$78,829 58
Freight do.	80,787 07	85,050 05
Mail do.	1,025 00	1,100 00
Express do.	2,467 18	2,500 00
Interest do.		
Rent do.		
	$163,180 63	$167,479 63

Apportionment.	1878.		1877.	
Receipts		$163,180 63		$167,479 63
Expenses	$92,441 70		$83,330 56	
Boston and Lowell railroad proportion	32,984 71		42,237 71	
Salem & Lowell railroad do.	1,460 00	3,275 00	1,460 00	
Lowell & Lawrence railroad do.	1,815 00	19,660 00	1,815 00	
Nashua & Lowell railroad do.	14,819 22	22,935 00	18,976 36	
Stony Brook railroad do.	1,550 00	47,803 93	1,550 00	
Lexington & Arlington & Stoneham Br. do.	2,150 00		2,150 00	
Peterboro' railroad do.	2,800 00		2,800 00	
Boston improvements, interest	8,450 00		8,450 00	
S. & L. and L. & L. railroads investments	1,100 00		1,100 00	
Lawrence Branch railroad interest	260 00		260 00	
Middlesex Central railroad proportion	1,250 00		1,250 00	
Phillips' wharf	1,500 00		1,500 00	
Int. on Lowell investments	600 00		600 00	
	$163,180 63	$163,180 63	$167,479 63	$167,479 63

DEFENDANTS' EXHIBIT 62. J. G. S., Ex'r.

(Put in evidence, page 235.)

A statement of the dates of the several meetings of the board of directors of the Nashua and Lowell Railroad Corporation as appears by their records from 1858 to 1878, both years inclusive.

1858. January 26.
" February 23.
" March 23.
" April 27.
" May 17.
" " 25.
" June 22.
" August 3.
494 " August 24.
" September 22.
" " 28.
" October 26.
" November 23.
" December 28.
1859. January 25.
" February 8.
" " 22.
" March 22.
" April 26.
" May 24.
" July 26.
" August 23.
" September 27.
" October 25.
" November 22.
" December 27.
1860. January 24.
" February 28.
" April 24.
" May 22.
" June 26.
" July 24.
" August 28.
" September 7.
" " 25.
" October 23.
" November 27.
" December 24.
1861. January 22.
" February 26.
" March 26.
1861. April 23.
" October 22.
" November 26.
" December 24.
1862. January 28.
" March 25.
" April 29.
" May 27.
" " 28.
" June 24.
" September 23.
" October 28.
" November 25.
1863. January 27.
" February 24.
" March 24.
" April 28.
" June 23.
" August 25.
" September 22.
" October 27.
" November 24.
1864. April 26.
" May 17.
" June 28.
" July 26.
" August 33.
" October 25.
" December 27.
1865. January 17.
" February 27.
" March 28.
" April 25.
" June 27.
" July 25.
" August 22.
" October 24.
" November 28.
" December 26.
1866. April 24.
" May 22.

495 1866. July 24.
" August 28.
" September 25.
" October 23.
" December 26.
1867. February 26.
" March 26.
" April 23.
" May 28.
" June 17.
" August 27.
" September 24.
" October 22.
" November 26.
" December 24.
1868. March 24.
" April 28.
" May 27.
" July 28.
" September 22.
" October 27.
" November 24.
" December 22.
1869. February 23.
" March 23.
" April 19.
" May 25.
" June 22.
" August 24.
" July 27.
" September 28.
" October 26.
" November 23.
" " 27.
" December 28.
1870. January 25.
" February 14.
" March 1.
" " 22.
" April 26.
" May 24.
" July 26.
" October 25.
" December 27.
1871. January 24.
" February 6.
" " 20.
" April 25.
" May 23.
" June 27.
" July 25.
1871. September 26.
" October 24.
" November 28.
" December 26.
1872. January 23.
" February 27.
" March 26.
" April 23.
" May 28.
" June 25.
" July 23.
" August 27.
" September 24.
" October 23.
" November 26.
1873. March 25.
" April 22.
" June 24.
" July 22.
" August 26.
" September 16.
" " 23.
" October 28.
496 " November 25.
" December 23.
1874. January 27.
" February 24.
" March 24.
" April 28.
" May 26.
" July 28.
" August 25.
" September 29.
" October 27.
" November 24.
" December 22.
1875. January 26.
" February 23.
" March 10.
" " 23.
" April 5.
" " 27.
" May 27.
" " 25.
" June 7.
" " 22.
" July 13.
" " 27.
" August 24.
" September 28.
" October 26.

1875 .November 15.
" " 27.
" " 23.
" December 28.
1876. January 25.
" " 29.
" February 8.
" " 23.
" March 28.
" April 25.
" May 10.
" " 23.
" June 9.
" " 27.
" July 25.
" August 22.
" September 26.
" November 6.
" " 28.
" December 26.
1877. January 23.
" February 27.
" March 27.
" April 24.
" May 22.
" June 5.
" " 14.
" " 25.
" " 26.
" August 25.
1877. September 25.
" " 28.
" October 2.
" " 20.
" " 23.
" " 27.
" November 27.
" December 26.
1878. January 21.
" " 22.
" February 26.
" March 26.
" April 19.
" " 23.
" May 4.
" " 28.
497–507 1878. June 8.
" " 25.
" July 23.
" August 27.
" September 3.
" " 9.
" " 14.
" " 21.
" " 24.
" October 22.
" November 13.
" " 15.
" " 18.

* * * * * * *

508 DEFENDANTS' EXHIBIT 67. J. G. S., Ex'r.

Nashua and Lowell Railroad Corporation.

The annual meeting of the Nashua and Lowell Railroad Corporation will be held at the depot hall, in Nashua, on Wednesday, the twenty-fifth day of May instant, at 9 o'clock a. m., for the choice of officers and the transaction of such other business as may come before the meeting.

EDWARD P. EMERSON, *Clerk.*

Nashua, May 5, 1864.

509 & 510 I hereby certify that the foregoing notice was published in the Boston Morning Post, the Nashua Gazette, and the New Hampshire Telegraph at least ten days prior to the day of meeting.

E. P. EMERSON,
Clerk of the Nashua and Lowell Railroad Corporation.

NASHUA, *May* 25, 1864.

According to previous legal notice the stockholders of the Nashua and Lowell Railroad Corporation met at the depot hall, in the city of Nashua, at 9 o'clock a. m.; the president, Mr. Crowninshield, in the chair, and called the meeting to order.

The twenty-ninth annual report of the directors was submitted, read by the president, and accepted and ordered to be placed on file.

The subject of the purchase of the real estate in Boston, situated at or near the Boston and Lowell railroad station, was introduced by the president, Mr. Crowninshield, and the measure advocated by him, Gen. Stark, and Gen. Hunt, when the following resolution, introduced by Gen. Adams, of North Chelmsford, was unanimously adopted, to wit:

Resolved, That the directors be empowered to invest the contingent fund of this corporation or any part thereof, at their discretion, in any lands, warehouses, or other real estate which, in their judgment, may secure the safety of the fund or be required for the better accommodation of the business of the corporation, either upon the line of their road or at the Boston terminus.

* * * * * * *

511–514 Boston and Lowell Railroad Corporation.

The annual meeting of the Nashua and Lowell Railroad Corporation will be held at depot hall, in Nashua, on Wednesday, the thirty-first day of May instant, at ten o'clock a. m., for the choice of officers and transaction of such other business as may come before the meeting.

EDWARD P. EMERSON, *Clerk.*

Nashua, May 5, 1865.

I hereby certify that the above notice was published in the Boston Post, the Nashua Gazette, and the New Hampshire Telegraph at least ten days prior to the day of the meeting.

E. P. EMERSON,
Clerk of the Nashua & Lowell Railroad Corporation.

Nashua, May 31, 1865.

According to previous legal notice the stockholders of the Nashua and Lowell Railroad Corporation met at depot hall, in the city of Nashua, this day at ten o'clock a. m. The president, Mr. Crowninshield, being absent, on motion of Gen. Stark, Daniel S. Richardson, Esq., was chosen president *pro tem.*

The thirtieth annual report of the directors was submitted and the abstract and trial balance read by the president; and, on motion, the report was accepted and ordered to be placed on file.

On motion, a committee of three was appointed by the chair to collect, sort, and count the votes for directors, treasurer, and clerk; and Messrs. Perley Dodge, Israel Hunt, and J. Thornton Greeley were made the committee, who attended to their duty and reported as follows:

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515 & 516 NASHUA, *May* 31, 1865.

According to previous legal notice the stockholders of the Nashua and Lowell Railroad Corporation met at the depot hall, in the city of Nashua, this day at ten o'clock a. m.

The president, Mr. Crowninshield, being absent, on motion of Gen. Stark, Daniel S. Richardson, Esq., was chosen president *pro tem.*

The thirteenth annual report of the directors was submitted and the abstract and trial balance read by the president; and, on motion, the report was accepted and ordered to be placed on file.

* * * * * * *

517 NASHUA, N. H., *May* 29, 1872.

In accordance with previous notice legally given, the stockholders of the Nashua and Lowell Railroad Corporation met at the depot hall, in the city of Nashua, N. H., at ten o'clock in the forenoon, the president, Mr. Crowninshield, in the chair.

518 & 519 The clerk read the call for the meeting, and also read the records for the last annual meeting.

The thirty-seventh annual report of the directors was presented by the president and by him read, with the certificate of the auditing committee, and, on the motion of Mr. B. F. White, were adopted and ordered to be placed on file.

The president also submitted the contracts with the Wilton railroad and the Peterborough railroad, the reading of which, on motion of Gen. Hunt, was dispensed with, as were also the leases of the same roads, which were before the stockholders in printed form.

Gen. Geo. Stark submitted the following resolution, which was unanimously adopted:

Resolved, That the contract for the extension of the lease of the Wilton railroad and for the lease of the Peterborough railroad from Wilton to Greenfield, as published in the appendix to the annual report, be approved and accepted by the corporation.

* * * * * * *

520 NASHUA, *May* 28, 1873.

In accordance with previous notice legally given, the stockholders of the Nashua and Lowell Railroad Corporation met at depot hall, in the city of Nashua, N. H., at ten o'clock in the forenoon, the president, Mr. Crowninshield, in the chair.

The clerk read the call for the meeting, and also the record of the last annual meeting.

The thirty-eighth annual report of the directors was then submitted by the president and by him read; when, on motion of Mr. J. M. Hunt, the report was accepted and ordered, with the report of the auditors, to be placed on file.

* * * * * * *

Col. John H. George introduced the following resolution, which was unanimously adopted by the full meeting of the stockholders present and voting thereon:

Resolved, That, for the purpose of enlarging the freight accommodations at Lowell, for purchasing rolling stock, and other needful

additions to the property of the road, the directors be authorized to issue two hundred thousand dollars of bonds of the company, having not exceeding twenty years to run, with interest, payable
521 semi-annually, at the rate of six per cent. per annum, both principal and interest payable in gold.

And that the present stockholders be entitled to subscribe for said bonds within sixty days from this date, at par, in the proportion of one hundred dollars for every four shares held by them; any bonds not subscribed for within said sixty days to be sold at the discretion of the directors.

On motion, the meeting was then dissolved.

E. P. EMERSON, *Clerk.*

* * * * * * *

COMMONWEALTH OF MASSACHUSETTS:

In the year one thousand eight hundred and seventy-one.

An act to authorize the Nashua and Lowell Railroad Corporation to increase its capital stock.

Be it enacted by the senate and house of representatives in general court assembled and by the authority of the same as follows:

SECTION 1. The Nashua and Lowell Railroad Corporation may, for the purchase of depot and terminal facilities, increase its capital stock fifty thousand dollars, and the capital stock of said corporation is fixed and limited at eight hundred thousand dollars: Provided, That no stock shall be issued for a less sum, to be actually paid in cash on each share, than the par value thereof.

SECT. 2. This act shall take effect upon its passage.

* * * * * * *

522 NASHUA, *May* 27, 1874.

In accordance with previous notice legally given, the stockholders of the Nashua and Lowell Railroad Corporation met at the depot hall, in the city of Nashua, N. H., at ten o'clock in the forenoon, the president, Mr. Crowninshield, in the chair.

523 The clerk read the call for the meeting, and also the record of the last annual meeting.

The thirty-ninth annual report of the directors was then submitted by the president and by him read; when, on motion of Mr. Dodge, of Amherst, the paper was accepted, and, with the report of the auditors, was ordered to be placed on file.

On motion of Col. John H. George, voted to proceed in the election of officers of the corporation, and the president appointed Col. George, Gilman C. Shattuck, and Solomon Spalding a committee to receive, sort, and count the votes cast and report the result to the meeting.

* * * * * * *

524–526 NASHUA, N. H., *May* 26, 1875.

In accordance with previous notice legally given, the stockholders met at the depot hall, in the city of Nashua, N. H., at

ten o'clock in the forenoon, President Crowninshield in the chair, with an unusually large attendance of the stockholders.

The clerk read the call for the meeting, and also the record of the last annual meeting.

The president then submitted the fortieth annual report of the directors, and — read by him at length.

Gen. Adams, of Chelmsford, moved that the report be accepted and placed on file; which [when], after some discussion, the motion prevailed unanimously.

On motion of Mr. Ross, of Boston, proceeded to the election of officers, and the president appointed Messrs. Ross, of Boston; Spalding, of Lowell, and Geo. A. Ramsdell, of Nashua, a committee to receive, sort, and count the votes and report the result.

* * * * * * *

527 NASHUA, N. H., *May* 31, 1876.

In accordance with previous notice legally given, the stockholders met at the depot hall, in the city of Nashua, N. H., at ten o'clock in the forenoon; president in the chair, and called the meeting to order. A very large number of the stockholders were present.

The clerk read the call for the meeting, and also the record of the last annual meeting.

The president then presented and read at length the forty-first annual report of the directors.

On motion of Col. J. H. George, the report was accepted and ordered to be placed on file.

Dr. E. B. Hammond, of Nashua, submitted a resolution to increase the number of directors to seven instead of five, as has been heretofore the number.

After a discussion the resolution was withdrawn.

George F. Richardson, Esq., of Lowell, moved that the meeting now proceed to elect five directors, a treasurer, and a clerk, and that a committee of three be appointed by the chair to collect, sort, and count the votes and report the result to the meeting; and George F. Richardson, Esq., of Lowell, Perley Dodge, Esq., of Amherst, and William S. Dexter, Esq., of Boston, were appointed such committee.

At this time Hon. Francis B. Crowninshield declined serving longer as one of the directors, remarking that the clerk's records show that he has served for a term of twenty-four years, nineteen of which as president.

The ballots were then collected, and the committee retired
528 to sort and count the votes, and they subsequently reported that, having attended to the duty assigned them, — found the following result:

The whole number of shares voted on for directors was found to be	5,558
Necessary for a choice	2,780
Daniel S. Richardson had	2,889
William W. Bailey had	2,862
Augustus Lowell had	2,850

Charles W. Amory had	2,864
Frank A. McKean had	2,886
Francis A. Brooks had	2,721
Knowlton S. Chaffee had	2,721
Jeremiah W. White had	2,701
Josiah G. Graves had	2,696
Harrison Hobson had	2,691

And the five first named gentlemen were declared elected directors of the Nashua and Lowell Railroad Corporation for the ensuing year.

* * * * * * *

The business of the meeting having been completed, Gen. Adams, of North Chelmsford, moved to dissolve the meeting; whereupon Jeremiah W. White called for a stock vote, which call he subsequently withdrew, and the meeting was dissolved without opposition.

E. P. EMERSON, *Clerk.*

529 * * * * * * *

NASHUA, N. H., *May* 30, 1877.

In accordance with previous notice legally given, the stockholders of the Nashua and Lowell Railroad Corporation met at depot hall, in the city of Nashua, at ten o'clock in the forenoon;
530 the president, the Hon. Daniel S. Richardson, in the chair, and called the meeting to order.

The clerk read the call for the meeting, and also the record of the last meeting.

The president then presented the forty-second report of the directors, which, on motion of Col. George, was accepted and ordered to be placed on file.

W. W. Bailey, Esq., moved that the number of directors be increased by the addition of two, making seven instead of five, as heretofore, and that the meeting proceed to the election of seven directors for the ensuing year, to be balloted for on one ticket.

The chair appointed a committee of three, consisting of Messrs. Tyler, of Lowell; Bancroft, of Boston, and Goodrich, of Nashua, to collect, sort, and count the votes and report the result. Subsequently, on motion, the chair appointed a committee of two, consisting of Messrs. J. A. Spalding, of Nashua, and G. H. Ramsdell, of Nashua, to collect, sort, and count the votes for a treasurer and clerk, this committee to act in concert with the first-named committee.

At this time Theodore H. Wood, Esq., announced to the meeting his declination to accept longer the office of treasurer of the corporation.

The ballots were then collected, and the committees proceeded to sort and count the same, and subsequently reported the result, as follows:

The whole number of shares voted on for the directors was found to be ---------- 4,009
Necessary for a choice ---------- 2,005

Daniel S. Richardson, of Lowell, had	4,009
William W. Bailey, of Nashua, had	4,009
Frank A. McKean, of Nashua, had	4,009
Francis A. Brooks, of Boston, had	3,989
William A. Tower, of Lexington, had	3,989
Joshua G. Graves, of Nashua, had	3,926
Jeremiah W. White, of Nashua, had	2,926

And the before-named seven gentlemen were declared elected directors for the ensuing year.

* * * * * * *

531 Perley Dodge, Esq., of Amherst, introduced the following resolution, which was unanimously adopted:

Resolved, That the stockholders of the company hereby request the directors to make an early investigation of the legal relations of this company with the Boston and Lowell and Peterborough Railroad Companies, and as to the rights of the company under any business contracts now in existence between it and these companies, and to ascertain whether the company has heretofore and is now receiving the full benefit of such contracts; and if they find otherwise, to take such measures as they deem expedient for realizing the benefits of said contracts, both past and present.

* * * * * * *

532–538 DEFENDANTS' EXHIBIT 70. J. G. S., Ex'r.

(Put in evidence, page 278.)

XX, Aug. 28, 1885, J. G. S., Ex'r.

Records of proceedings of meetings of the directors of the Nashua and Lowell R. R. Corporation from July 18, 1856, to May 28, 1867, these meetings, after the joint-traffic contract, having been held, jointly with the directors of the Boston and Lowell R. R. Corporation, once a month in Boston, so that the doings here recorded are not only the doings of the Nashua and Lowell R. R. Corporation's directors, but of the directors of the Boston and Lowell R. R. Corporation after January, 1857, unless it otherwise appears from said records.

DEFENDANTS' EXHIBIT 71. J. G. S., Ex'r.

(Put in evidence, page 278.)

XXX, Sept. 2, 1885, J. G. S., Ex'r.

Record of proceedings of directors of the Nashua and Lowell R. R. Corporation at all meetings of said directors from June 17, 1867, to Feb. 26, 1878, inclusive, both those meetings held jointly with

the directors of the Boston and Lowell Corporation at Boston, and those held separately during same period. The meetings held on the fourth Tuesday of every calendar month at the manager's office in Boston, herein recorded as meetings of the directors of the Nashua and Lowell R. R. Corporation, were in fact joint meetings of the directors of both the Nashua and Lowell R. R. Corporation and of the Boston and Lowell R. R. Corporation, though this fact does not always appear from the record as kept by the clerk of Nashua and Lowell railroad directors.

* * * * * * *

539 DEFENDANTS' EXHIBIT 75. J. G. S., Ex'r.

(Put in evidence, page 302.)

(This paper is an agreement between the Nashua and Lowell Railroad Corporation and the Boston and Lowell Railroad Corporation to submit to arbitration the matters therein named, and is the same as Exhibit E, annexed to the answer of the Boston and Lowell Railroad Corporation and printed on pages 47 to 54, inclusive, except that the title "Exhibit 2" is inserted before the "Claims of the B. and L. R. R. *v.* The N. and L. R. R.," as printed on page 52, and therefore this Exhibit 75 is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 76. J. G. S., Ex'r.

(Put in evidence, page 302.)

(This paper is the award of the arbitrators named in Exhibit 75, and is the same as Exhibit F, annexed to the answer of the Boston and Lowell Railroad Corporation and printed on pages 54 to 59, inclusive, and therefore is not printed here.

JOHN G. STETSON, *Clerk.*)

DEFENDANTS' EXHIBIT 77. J. G. S., Ex'r.

(Put in evidence, page 303.)

Nashua and Lowell Railroad in Account with Boston and Lowell Railroad.

1880.		DR.	
Oct. 1.	To monthly balances since Dec. 1, 1878, 22 months to date, after deducting $14,009.24 paid over to Fitchburg railroad by N. & L. Cor. for B. & L. Cor	$34,400	89
	To amount of mail service collected by N. & L. Cor. of U. S. P. O. Department for three months ending Dec. 31, 1880	1,487	67
		$35,888	56
540	Deduct for charges made by N. & L. Cor. for switching done at Lowell, reduced by compromise to	3,914	43
		$31,974	13

1880. Cr.

Oct. 1.	By amount of mail money collected by B. & L. R. R. of U. S. P. O. Department, not accounted for to N. & L. Cor.	$1,630 34
	By proportion of Framingham & Lowell R. R. rental paid for use Middlesex-St. station, 22 mos.	2,200 00
	By rent of freight-house in Boston (31%), at 5% on cost ($95,325.00), 22 mos.	8,738 13
	By balance due B. & L. R. R. Cor. on above	19,405 66
		$31,974 13
Oct. 1.	To balance on above account	$19,405 66
	To int. on same for 3 yrs. to Oct. 1, 1883	3,493 02
		$22,898 68

1883.

July 24. Received of the Nashua & Lowell R. R. Corporation its note for $22,898.68, payable Oct. 1, 1883, in payment of the above account, but without prejudice to the claim of the B. & L. R. R. Corporation for terminal charges in its favor against the Nashua & Lowell R. R. Cor. at Boston and Mystic, no such charges being embraced in the above account.

Boston, *July* 28, 1883.

Settled as above.

C. E. A. BARTLETT,
Treas. Boston & Lowell R. R. Corporation.

541 Defendants' Exhibit 78. J. G. S., Ex'r.

(See deposition of C. E. A. Bartlett, answer to Int. 173, page 325.)

(Put in evidence, page 330.)

Articles of agreement entered into this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and sixty-seven, by and between the Connecticut and Passumpsic Rivers railroad, a corporation duly established by the laws of the State of Vermont, party of the first part, and the Boston and Lowell Railroad Corporation, established by the Commonwealth of Massachusetts, and the Nashua and Lowell Railroad Corporation, established by the laws of Massachusetts and New Hampshire, each for themselves and not one for the other, parties of the second part.

Article I.

The business to be regulated and adjusted by this agreement shall consist of all passengers and goods ticketed or billed or sent between stations upon the Connecticut and Passumpsic Rivers railroad and stations upon the Boston and Lowell and Nashua and Lowell and Salem and Lowell railroads in either direction.

Article II.

Each party, respectively, shall furnish upon its own road the necessary and proper motive power for said business, and shall see that the trains are transported promptly, without unreasonable or unnecessary delay.

Article III.

Passenger and freight cars for the accommodation of said business shall be furnished by the party of the first part, and shall be by them sufficiently manned and equipped with conductors, brakemen, and baggage-masters, with stove, fuel, and oil, and other necessary labor and supplies for the operation and maintenance of the same in proper condition, while on said second party's roads.

Article IV.

Each party shall furnish upon its own railroads all necessary and proper station and depot accommodations, furnish and sell tickets to passengers, check baggage and property, receive, load, bill, and forward freight to be transported, and properly receive and deliver freight from each other, discharging and returning all cars without unreasonable delay, and furnish all stationery, clerk hire, and labor incident thereto. Each party shall also collect and be responsible for the dues and receipts on account of said business made
542 payable upon their respective roads, and shall, once in each month, render and settle a proper account of the same, and pay over to each other the balance found to be due thereon.

Article V.

The conductors, brakemen, baggage-masters and other servants of the first party, employed upon the trains, shall, while upon the roads of the second party, be under the direction and control of the officers of the second party in the same manner and to the same extent as if employed by the second party.

Article VI.

The first party shall assume all risks and liabilities of every description to, upon, and for the joint business herein defined, and upon the servants and property of the first party while upon the roads of the second party, and shall save the second party harmless and indemnify them against all cost and expense on account of any and all claims for injury or damage which may happen to the passengers and goods carried on joint account, or the servants or property of said first party; such risks and liability to extend to any such passengers, servants, or freight which may happen to be in or upon any cars used upon the roads of the second party: Provided, however, That the risks and liabilities herein contemplated shall not lie on said party of the first part for freight or baggage to be transported from stations upon the roads of the second party to the road of the first party before the same shall have been loaded into or

upon the cars, nor for any loss or damage occurring to freight or baggage after the car in or upon which it is loaded shall have arrived at the station of its destination upon the roads of the second party, unless in either case damage accrues through negligence of the agents or servants of said first party.

Article VII.

The first party shall regulate the joint tariffs of fares and freights as they may from time to time elect, but no change in arbitrary weights or in classification of freight shall be made from the tariff of said Connecticut and Passumpsic Rivers railroad, hereto annexed, dated Oct. 1, 1867, without the consent of the second party being first obtained in writing thereto.

Article VIII.

The party of the first part shall direct, so far as public convenience and orders of purchasers and forwarders will allow, all its passenger and freight business between said Connecticut and Passumpsic Rivers railroad and Boston, and its vicinity, or
543 Salem, in either direction, by way of the roads of the second party, excepting that a portion of its cattle business, being assigned to the Boston, Concord and Montreal railroad, is thereby subject to be carried with the trains of that road in the direction that they may contract.

Article IX.

The second party shall be allowed and paid monthly by the first party for the haulage and other service thus performed, and to cover the proportion of receipts and profits on said joint business due to the said second party, at the rate of eighty-six cents per passenger, between Nashua and Boston, in either direction, and a ratable proportion for passengers to and from way stations between Nashua and Boston, and for first and higher class freight between Nashua and Boston and way stations three and three-fourths cents per mile per net ton of two thousand pounds, and for second-class freight three cents per mile per net ton, and for third-class freight two and three-fourths cents per mile per net ton, and for fourth-class freight two and one-fourth cents per mile per net ton, and for depot charges at way stations twenty-five cents per ton, the distance between Nashua and Boston to be rated thirty-nine miles.

This contract shall commence and take effect on the first day of October, A. D. 1867, and continue two years and thereafter until six months' written notice shall be given by either hereto.

In witness whereof the parties have hereunto affixed their signatures the day and year first above written.

(Signed)

THE BOSTON AND LOWELL AND NASHUA AND LOWELL R. R. CORPORATIONS,

By H. HOSFORD, } *Committee*
GEO. STARK, } *Duly Authorized.*

In presence of—
S. TYLER, JR., witness to H. Hosford.
L. R. KIDDER, " " Geo. Stark.

(Signed) CONN. AND PASSUM. RS. R. R. CO.,
By HENRY KEYES, *Pres't.*

Witness:
A. H. PERRY.

544 DEFENDANTS' EXHIBIT 79.

(See deposition of C. E. A. Bartlett, answer to Int. 175, page 326.)

(Put in evidence, page 331.)

This memorandum of an agreement entered into the twenty-fourth day of February, in the year 1870, between the trustees and managers of the Vermont Central Railroad, party of the first part, the Northern railroad of New Hampshire, party of the second part, the Concord Railroad Corporation, party of the third part, and the Nashua and Lowell and Boston and Lowell Railroad Corporations, parties of the fourth part, witnesseth:

That whereas the respective parties own, operate, or control the several parts of a continuous line of railroads extending between Boston, in the State of Massachusetts, and the Province line, in the State of Vermont, with sundry roads and branches connecting therewith; and whereas it is for the best interest of all concerned that so much of the transportation business over said roads as is common between the said first party and the said other parties severally should be managed in such manner as to secure efficiency, economy, and public convenience: Now, therefore, for the accomplishment of these purposes and for the purpose of maintaining between themselves relations which shall prevent conflicts of interest between any of their respective roads and branches, it has been and is hereby mutually agreed between the parties as follows:

Article I.

This agreement is made for the purpose of facilitating between such of the parties hereto as may be concerned therein the business included in this agreement and the adjustment and settlement of all matters arising therefrom, and each of the said parties does hereby agree only for itself and so far as its own roads may be concerned, and nothing herein contained is to be construed as in any way creating or authorizing any copartnership between the parties, or any obligation or liability at any time on the part of one party for any business to be done on the line of any other party, or for any acts or defaults of any other party hereto, but each party is to be answerable only for its own roads and its own acts and defaults, except as hereinafter specifically provided for settlements between themselves.

Article II.

The business contemplated in this agreement is the transportation of persons and property between Boston at the east and Rouse's Point and the Province line, in Vermont, at the west and north, and all points intermediate and beyond these points respect-
545 ively which are accessible to the general line hereby formed, including also the business on and over the road from Lowell to Salem and the road from the Province line to St. Johns so far as either of the same are controlled by any of the parties hereto.

Article III.

For the better and more harmonious conduct of said business, it shall be intrusted to the immediate control of a board of six directors, of whom three shall be chosen by the first party and one by each of the other parties, at such times as they may think proper, and a majority of said directors present at any meeting shall govern in all matters included in this agreement. Said directors, in the management of said business under this agreement, shall be regarded and act as the agents of each of the parties, respectively, so far as the transportation of said business over its own roads, as aforesaid, may be concerned, but not otherwise.

Said board shall choose a chairman from their number, who shall act as a general manager of the line in all matters covered by this agreement, under the advice and direction of the board.

Article IV.

Each party hereto is to furnish for the joint passenger business aforesaid, over its own roads, suitable passenger and baggage cars, properly manned with conductors and all necessary servants, and warmed, lighted, lubricated, cleaned, and otherwise made attractive to travelers.

And the risks of transportation upon said joint passengers and servants and cars or property in and upon said passenger trains shall be assumed by the said parties respectively on their own roads, and not elsewhere. Either of the contracting parties may by mutual agreement furnish cars to run beyond its own road, in which case it shall be allowed by the party or parties on whose road it furnishes cars, for the use and car risk thereof, one-fourth of a cent for each joint passenger per mile hauled therein, and for emigrant passengers a sum less in the same proportion as the emigrant price of passage is less than the first-class.

Article V.

When it is deemed expedient that baggage-masters should go through between Boston and stations on the said roads of the first party, for the purpose of taking charge of the baggage and cars, the expense shall be borne by the several parties in proportion to the length of their roads over which such baggage-masters may pass.

546 Article VI.

The party of the first part shall furnish and maintain in good running order a sufficient number of substantial freight cars suitable for the convenient carriage of all the merchandise offered for transportation between through points named on the joint tariff, but the other parties may by mutual agreement furnish merchandise cars for such joint business to an extent not exceeding their proportion in the division of joint merchandise receipts.

In compensation for the use and maintenance of such cars for joint merchandise the party furnishing the same shall be allowed and paid out of the joint gross receipts the sum of two-fifths of one cent per ton per mile for each ton of joint merchandise hauled therein, and a like sum per ton per mile on each ton of freight carried therein between one local point and another on any road other than the road of the party furnishing the car, or between any points on the line off of the road or roads of the party owning the cars; the tonnage to be reckoned according to the specifications of tariffs annexed.

Cars belonging to any road in the line shall not be sent beyond the limit covered by joint tariff, or connecting roads or branches operated by any of these parties, except by payment of the regular rate of service and the sum of two dollars per day for each car until returned to the place where it left the line; nor shall such cars be used for any business going from one point to another in the line unless going over a portion of the road owning them, except in some instances a car may be loaded for some point in the line in the direction of the road to which the car belongs when it can be done without any great detention to the car.

Article VII.

The joint tariffs on passengers and freight, being established by the first party and copies appended hereto, shall not be changed during the continuance of this agreement, in such manner as to diminish the aggregate or comparative receipts of the other parties therefrom, without their respective consent.

Article VIII.

Except as hereinafter otherwise specially provided, all damages to any freight car while in use for any business included in this agreement shall be repaired or paid by the party owning the same, and all losses or damage to freight therein shall be paid by the parties over whose line the same is for transportation, in the proportion of their respective interests in the division of the receipts on the way-bills of the goods to which said losses or damage happens, as hereinafter provided.

547 Each party may examine the cars of each other party when they come on their line, and, if deemed unsafe, may repair them at the expense of the owners, or reject them from the line, giving immediate notice to the owners, whose duty it will be to remove such cars and supply others in their place.

The liabilities of the parties who load the cars shall include and cover all damage or loss of goods from the time the same are received at the depots until they are loaded in the cars and delivered in the train ready to start, as well as all liability or damage incurred from improper loading, stowage, or misdirection of freight, and the liability of parties unloading is to include and cover all damage or loss caused or suffered after the cars arrive at the station to which they are destined.

In selecting cars for the loading of freight preference shall be given to the cars of the road having its whole length or the greatest proportionate length in the line over which such freight is to be transported.

Article IX.

A depot charge shall be allowed and paid out of the joint receipts as compensation for rents of grounds and buildings, for loading and unloading freight, for booking and billing, and for collecting and accounting for moneys made there payable, and for risks about the depot; which said charge is to be paid to and received by the party at whose station the said facilities are furnished. Such charge is to be based on the unit of a ton as defined in the tariffs hereto annexed, and shall be thirty cents per ton at Boston and East Cambridge and Burlington and twenty cents per ton at all other stations.

Article X.

A charge of twenty cents per tariff ton shall be allowed the first party and paid out of the proportion of the second, third, and fourth parties, and the proportion of the Ogdensburg and Lake Champlain railroad on all freights received at Ogdensburg by water or from the Grand Trunk or other Canadian railroad at Prescott, including flour and meal manufactured at Ogdensburg from grain received there as above and transported over the roads of the first party to any point on or beyond the roads of the other parties, as provided in this agreement.

Article XI.

Each party shall collect all bills for joint-freight business that may be due at stations on its roads, and furnish and sell joint tickets to passengers at such stations as the through management shall direct, and shall be answerable to the other parties for the proportions of such collections and sales to which they are severally entitled.

548 Article XII.

The receipts from the joint passenger and freight business due under this agreement shall be apportioned between the parties hereto as follows:

The gross receipts from joint passengers are to be divided between the parties in the proportions of the distances transported over each party's road, except when the tariff is made up by adding local rates, in which case no road shall receive for its proportion more than its local tariff rate, and from the proportion of each road thus ascertained there shall be deducted and paid over to the party furnishing the cars the amount of car and risk service earned under the provisions of article No. 4. There shall also be deducted from the remaining proportions of the second, third, and fourth parties ten per cent. of their said remainder and paid to the party of the first part.

The gross receipts from joint freight are to be thus divided:

From the whole amount received there is to be deducted terminal charges, as referred to in article No. 9, and car service, as referred to in article No. 6; the remainder to be divided between the parties, respectively, in proportion to their length of road on which said freight is transported, except that in no case shall any road in division receive more than its local tariff rate. From the proportion thus ascertained of the second, third, and fourth parties, including their depot charges, ten per cent. is to be deducted and paid over to the first party.

And for certain freight from Ogdensburg a further payment is to be made to the first party, as defined in article No. 10.

Article XIII.

It shall be the duty of each of the parties hereto to exercise all due diligence in loading, unloading, and returning the cars of the other parties when consigned to points on their respective road.

An agent shall be employed by the party of the first part to look after the cars in the line, to guard against unnecessary or unreasonable detentions, and the proportionate expense of such agency shall be borne by the parties hereto in the proportions of their respective interest in the joint haulage; and the said agent shall conform to such rules and regulations as shall be established from time to time by the board of directors hereby constituted.

Article XIV.

It is the intent of the parties to this agreement to secure to the connecting and continuous line of railroad above mentioned all the business requiring transportation between points thereon or which may be conveniently reached thereby, and the parties hereto mutually agree that they will not do nor, so far as they can control
549 the same with a just regard to the public convenience, suffer to be done any act or thing which shall in any way contravene the letter or spirit of this agreement, and that they will, respectively, so far as they properly may, in all respects manage and direct said business on their several roads so as to secure to the others the traffic as hereby intended.

Nothing, however, in this agreement contained shall be construed to prevent the party of the first part from maintaining its present relations with other connecting roads: Provided, That not exceeding

the proportionate amount, nor in any one year the aggregate amount, in quantity or tariff value of business which in the year 1866 passed over the Cheshire railroad from stations on the roads of the first party may be continued to said Cheshire railroad, without violation of this contract: Provided, also, That the through rates by said Cheshire railroad shall not be less, nor the local proportions of the first party more, per mile of their road used than upon business by the line hereby formed.

And it is further agreed that in the fair discharge of the obligations assumed by the party of the first part, to promote the interests of the line formed by this agreement, it shall be the duty of the said party of the first part to protect the said parties of the second, third, and fourth parts, by all proper measures, from any undue or improper means of any other connecting road to influence freights or passengers from the line hereby formed, whether said influence is used in the way of offering lower rates, paying drawbacks, giving free passes, and the like, or any other improper and unfair means.

And the said party of the first part shall, if requested by either of the other parties hereto, make annual returns to said other parties of the whole amount in quantity and tariff value of the business contemplated in this agreement which has been done by way of the Cheshire railroad, as provided in this article, or otherwise.

Article XV.

This agreement shall continue and be in force between the parties for and during the term of twenty years from March 1, 1870: Provided, however, That if for any cause there shall be a failure in the performance of a certain contract this day entered into by and between the Sullivan County railroad, of the one part, and J. Gregory Smith, of St. Albans, Vermont, of the second part, by reason of which said Smith shall, without any intentional default on his part, be deprived of the use of said Sullivan County railroad, as provided in said contract, and the Vermont Central railroad be thereby deprived of a connection by said Sullivan County railroad with the railroads connecting with said Sullivan railroad at Bellows' Falls, then the party of the first part may terminate this agreement by giving thirty days' notice thereof, in writing, to the parties of the second, third, and fourth parts.

In witness whereof the respective parties have hereunto subscribed, and affixed the seals of said corporations the day and year first above written.

The Trustees and Managers of Vt. Central & Vt. & Canada Railroads,
In presence of— (Sig.) By J. GREGORY SMITH.
GEO. E. TODD.

L. S.

The Northern Railroad, by their Committee duly authorized,
(Sig.) ONSLOW STEARNS,
" URIEL CROCKER.

The Concord Railroad Corporation,
GEO. E. TODD. (Sig.) By J. MINOT, *Pres't.*

The Boston & Lowell Railroad Corporation, by its Committee,
(Sig.)

L. R. KIDDER.

L. S.

J. G. ABBOTT,
F. B. CROWNINSHIELD, } *Com.*
GEO. STARK, *Manager*,

The Nashua & Lowell Railroad Corporation, by its Committee,
(Sig.)

L. R. KIDDER.

L. S.

F. B. CROWNINSHIELD,
GEO. STARK, *Manager*, } *Com.*
J. G. ABBOTT,

DEFENDANTS' EXHIBIT 80. J. G. S., Ex'r.

(See deposition of C. E. A. Bartlett, answer to Int. 182, page 328.)

(Put in evidence, page 331.)

This agreement, made the twenty-fourth day of February, in the year one thousand eight hundred and seventy, between the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies, parties of the first part, and the Northern railroad of New Hampshire, the Concord Railroad Corporation of New Hampshire, the Nashua and Lowell Railroad Corporation of New Hampshire and Massachusetts, and the Boston and Lowell Railroad Corporation of Massachusetts, respectively, parties of the second part, witnesseth:

551 Whereas, by a contract this day executed between the said first parties and the Ogdensburg and Lake Champlain Railroad Company, the railroad and property of the said last-named company has passed into the control and possession of said first parties, whereby the business of said railroad becomes business originating with and belonging to said first parties; and

Whereas, as the consideration for the agreements on the part of said Ogdensburg and Lake Champlain Railroad Company contained in said contract, the said first parties have agreed to pay certain sums, in the currency of the United States, to said Ogdensburg and Lake Champlain Railroad Company in each year during the continuance of said contract, viz., three hundred and eighty-four thousand six hundred and twenty (384,620) dollars in each and every year for the term of three years from and after the first day of March next, and the sum of four hundred and fifteen thousand three hundred and ninety (415,390) dollars each and every year thereafter for three years, and the sum of four hundred and forty-six thousand one hundred and sixty (446,160) dollars per annum thereafter so long as this contract shall continue, all such payments being subject

to the conditions and limitations provided for in such contract, to which reference is made; and

Whereas the said contract, by reason of existing business connections and otherwise, is expected to bring increased business and revenue to all parties hereto:

Now, with the view of affording greater facilities to the public, of facilitating settlement and fixing the terms of connection, and all other matters with reference to any and all business between any and all points on said Ogdensburg and Lake Champlain railroad and any and all points on the railroads of the parties hereto or the railroads connecting therewith, it is agreed as follows:

First. The said Ogdensburg and Lake Champlain railroad shall be run, operated, and managed in a prudent and judicious manner, so as to maintain and if possible to increase its efficiency as a business connection and feeder to the roads of these parties, respectively.

Second. The parties of the first part agree that the parties of the second part shall have an equal voice and control with said first parties in the management of said Ogdensburg and Lake Champlain railroad in all respects, and with this view such management shall be placed in the hands and control of an executive committee of two persons, one to be appointed by the parties of the first part and one by the parties of the second part; and in case of disagreement between said executive committee the points of difference shall be referred to the board of six directors named in the contract of 1870 between these parties in reference to the business of the Vermont Central and Vermont and Canada railroads.

Third. For the purpose of determining the question of ex-
552 cess or deficiency, as hereafter provided, in the working of said Ogdensburg and Lake Champlain railroad under the contract herein referred to, the division of joint receipts between the Ogdensburg and Lake Champlain railroad and these parties or other railroads shall be computed on the basis in use during the year 1869, unless otherwise mutually agreed on between these parties; and it is agreed that the entire excess or deficiency of net earnings over and above or below the expenses and payments to be made as provided in said contract and the expenses of operating said road shall be divided among all the parties hereto in exact proportion to the gross receipts of each of said parties from the business between any and all points on said Ogdensburg and Lake Champlain railroad and any and all points on or beyond the railroads of the parties hereto; and the liability of each of the parties hereto for allowance for such deficiency shall be limited to its said gross receipts for its own road, and said excess or deficiency may from time to time be merged by the respective parties in their accounts of receipts from such business.

Fourth. It is further agreed, in order that security may be afforded by the parties of the first part to said Ogdensburg and Lake Champlain Railroad Company under the contract aforesaid between them, that the parties of the second part severally will reserve and pay, as hereinafter provided, monthly from the gross earnings

belonging to the parties of the first part collected by them on account of any business to and from the Ogdensburg and Lake Champlain railroad in currency of the United States, one-twelfth part of the payments to be made in any given year by the first parties to the Ogdensburg and Lake Champlain Railroad Company under the contract between them before mentioned, and such monthly payments are hereby authorized and shall be allowed and accounted in the settlement between the parties hereto.

And the parties of the second part, in order to define the manner in which the payment aforesaid shall be made to the Ogdensburg and Lake Champlain Railroad Company, hereby severally agree to deposit with the manager of the Boston and Lowell railroad, at Boston, on or before the last day of each and every month, from funds in their hands belonging to parties of the first part, collected on account of business to and from said Ogdensburg and Lake Champlain railroad as aforesaid, the amount of the monthly payments due from the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central Railroad Company to the Ogdensburg and Lake Champlain railroad; and the treasurer of the Ogdensburg and Lake Champlain railroad is hereby authorized to draw the same, on the first day of each and every month, on the manager of the Boston and Lowell railroad, who is hereby authorized to pay the draft.

Fifth. This contract shall take effect on and from the first day of March, 1870, and continue in force twenty years thereafter or during the continuance of the contract herein first referred to.

553 Sixth. It is further agreed that the parties of the first part may, if they desire, assign this contract to the Ogdensburg and Lake Champlain railroad as security for the performance of the contract entered into between said first parties and said Ogdensburg and Lake Champlain Railroad Company.

Seventh. The provisions of the contract of 1870 between these parties relating to the business of the Vermont Central and Canada railroads, so far as they relate to the direction of business, shall apply to and control the business of the Ogdensburg and Lake Champlain railroad under this contract.

Eighth. The contract between the Vermont and Canada Railroad Company and the managers and trustees of the Vermont Central and the Ogdensburg and Lake Champlain Railroad Companies, before mentioned, shall not be modified, changed, or abrogated with either the consent or procurement of said first parties without the prior written consent of said second parties; nor shall the capital stock or securities of the Ogdensburg and Lake Champlain railroad be increased for the purpose of enlarging the equipment, as provided in contract first herein referred to or otherwise, without the prior written consent of the second parties hereto.

Ninth. Whenever any claim of said Ogdensburg and Lake Champlain Railroad Company against the trustees and managers of the Vermont Central and Vermont and Canada railroads, growing out of the contract between them herein referred to, shall be definitely established by judgment or otherwise the parties hereto do further

severally agree that they will, on thirty days' notice, severally reserve the amount of said claim from the gross receipts of the business to and from the Ogdensburg and Lake Champlain Railroad Company in their hands, respectively, as provided in article four of this contract, and pay the same to the manager of the Boston and Lowell Railroad Corporation in addition to the sum provided by said article to be paid monthly to said manager; and said additional sum so reserved and paid shall be subject to the draft of said Ogdensburg and Lake Champlain Railroad Company, as is provided in said article.

In witness whereof the parties have hereunto set their hands and the seals of said corporations, respectively, this twenty-fourth day of February, 1870.

The Vermont and Canada Railroad Company, by
(Signed) JOHN PORTER, *Vice-Pres.*
(Signed) SAMUEL ATHERTON, *Director.* [SEAL.]

The Trustees and Managers of Vermont Central and Vermont and Canada Railroads,
(Signed) J. GREGORY SMITH. [SEAL.]
(Signed) B. P. CHENEY. [SEAL.]

554 The Boston and Lowell Railroad Corporation, by their Committee duly authorized,
(Signed) F. B. CROWNINSHIELD.
(Signed) J. G. ABBOTT.
(Signed) GEO. STARK.

The Nashua and Lowell Railroad Corporation, by their Committee duly authorized,
(Signed) F. B. CROWNINSHIELD.
(Signed) GEO. STARK.

The Northern Railroad, by their Committee duly authorized,
(Signed) ONSLOW STEARNS.
(Signed) URIEL CROCKER.

In consideration of one dollar paid by the Ogdensburg and Lake Champlain Railroad Company, the receipt whereof is hereby acknowledged, *by* the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central railroad hereby assign and transfer to said Ogdensburg and Lake Champlain Railroad Company all their interest in the within written contract as collateral security for the performance on their part of all stipulations contained in the agreement, of even date herewith, between said Vermont and Canada Railroad Company and said trustees and managers and said Ogdensburg and Lake Champlain Railroad Company.

In witness whereof the said Vermont and Canada Railroad Company has caused its corporate seal to be affixed and this instrument to be signed by its vice-president and Samuel Atherton, one of its directors, and said trustees and managers have hereto set their

hands and seals, this twenty-fourth day of February, A. D. one thousand eight hundred and seventy.

(Signed) JOHN PORTER, *Vice-President.*
(Signed) SAMUEL ATHERTON, *Director.* [SEAL.]

[U. S. certificate stamp, int. rev.]

The Trustees and Managers of Vermont Central and Vermont and Canada railroads,

(Signed) J. GREGORY SMITH.
(Signed) B. P. CHENEY. [SEAL.]

It is hereby agreed by and between the Vermont and Canada Railroad Company, the trustees and managers of the Vermont Central Railroad Company, the Northern railroad of New Hampshire, the Nashua and Lowell Railroad Corporation, and Boston and Lowell Railroad Corporation as follows:

555 Whereas a contract of this date has been drawn to be executed by the parties hereto in conjunction with the Concord Railroad Corporation and to be assigned to the Ogdensburg and Lake Champlain Railroad Company as collateral security for the performance of a contract of this date between the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central Railroad Company and the Ogdensburg and Lake Champlain Railroad Company;

And whereas the Concord Railroad Corporation is now ready to execute said contract, and the parties hereto believe it for their interest that the same should immediately go into effect, whether executed by said Concord Railroad Corporation or not:

Therefore we covenant and agree each with each other and all of the others that the said contract may be delivered without being executed by said Concord Railroad Corporation, and that when so delivered it shall be of full force and effect and obligatory upon each and all of us from this date, but this shall not prevent the execution of said contract by said Concord Railroad Corporation at any time hereafter.

In witness whereof the said corporations have caused their corporate seals to be hereto affixed and these presents to be signed, and the trustees and managers of the Vermont Central Railroad Company have hereto set their hands and seals, this twenty-fourth day of February, A. D. eighteen hundred and seventy.

Vermont and Canada Railroad, by
(Signed) JOHN PORTER, *Vice-President.*

Trustees and Managers V. C. R. R. and Vermont and Canada Railroad.

(Signed) J. GREGORY SMITH.
(Signed) B. P. CHENEY.
(Signed) L. BRAINARD.
(Signed) JOSEPH CLARK.

The Boston and Lowell R. R. Corporation, by its Committee,
(Signed) F. B. CROWNINSHIELD,
(Signed) J. G. ABBOTT,
(Signed) GEO. STARK, *Manager*,
} *Committee.*

The Nashua and Lowell R. R. Corporation, by its Committee,
(Signed) F. B. CROWNINSHIELD,
(Signed) GEO. STARK, *Manager*,
(Signed) J. G. ABBOTT,
} *Committee.*

Northern R. R. Corporation, by its Committee,
(Signed) ONSLOW STEARNS.
(Signed) URIEL CROCKER.

556 DEFENDANTS' EXHIBIT 81. J. G. S., Ex'r.

(See deposition of C. E. A. Bartlett, answer to Int. 183, page 328.)

(Put in evidence, page 331.)

Articles of agreement between the Ogdensburg and Lake Champlain Railroad Company, a corporation organized under the laws of the State of New York, party of the first part, and the Vermont and Canada railroad, a corporation organized under the laws of the State of Vermont, and the managers and trustees of the Vermont Central Railroad Company, who have the possession and management of the Vermont Central railroad by virtue of decrees of courts and the laws of the State of Vermont, parties of the second part.

Whereas the aforementioned railroads form one connecting line of railroad track from the foot of ship navigation of the Great Lakes, at Ogdensburg, to White River Junction and Windsor, Vermont, and the traffic and business of each of the railroads is so intimately connected that it can be carried on and conducted to the greatest advantage of all concerned by having all the said roads under one management, with proper arrangement for an equitable division of the earnings; and

Whereas a consolidation of said railroads may ultimately be found desirable for the benefit of the public and of the stockholders of all the roads, as provided for by the act of the Legislature of the State of New York, passed May 29, 1869, entitled "An act authorizing the consolidation of certain railroad companies," but that a temporary arrangement (within the terms of said act) is most desirable for all interests until it can be clearly seen whether full consolidation to the extent authorized by said act will be advantageous to all parties:

Now, therefore, it is covenanted between said parties, jointly and severally, as follows:

Article I.

That the parties of the second part, either by themselves or in connection with other railroad corporations, by virtue of business contracts regulating the business from said Ogdensburg and Lake Champlain Railroad Company, shall have the possession and control and use of the Ogdensburg and Lake Champlain railroad, with its branches and all its locomotives, cars, engines, and all other rolling stock, and all its tracks, elevators, switches, and all its station-houses, storehouses, offices, and all its other buildings of every description, and all the lands and real estate of the party of the first part, with all its rights of way and passage, excepting, however, and expressly reserving all those certain woodlands and all those certain village lots, etc., described in the schedule hereunto annexed
557 and marked "Schedule A," and the party of the first part reserves its interest in the steam fire-engine in the city of Ogdensburg.

Article II.

All the gross receipts of and from the business and traffic of or upon the Ogdensburg and Lake Champlain railroad after the first day of March, A. D. 1870, shall belong to the parties of the second part, and be collected by the managers aforesaid and disposed of as the said parties of the second part shall direct.

Article III.

The Ogdensburg and Lake Champlain Railroad Company hereby sells to the party of the second part all the fuel, lumber, timber, new ties, oil and waste, and stationery, and all other things of a like character furnished for use upon its road, and also assign to the party of the second part all existing contracts they have for any such property, and the parties of the second part agree, jointly and severally, to pay for the same at cost; and all the rails owned by the Ogdensburg and Lake Champlain Railroad Company not in the track at the time this contract goes into effect shall be taken by the parties of the second part and paid for by them at a valuation to be appraised by a person to be appointed by the Ogdensburg and Lake Champlain Railroad Company, with the superintendent of the Vermont Central railroad, and if they disagree in any respect all their cases of disagreement shall be determined by an umpire whom they shall choose, and whose decision shall be final; and the cost of the other articles shall be determined by the same persons in the same manner. The parties of the second part jointly and severally agree to pay the parties of the first part, its successors and assigns, for all the property mentioned or coming within the terms of this article, at their office, in Boston, on the delivery thereof, and no delivery shall be considered complete until the payment is made.

And the parties of the second part assume and agree to fulfil all existing agreements of the party of the first part for purchase of supplies and for transportation. All such agreements are described in "Schedule B," hereto annexed.

Article IV.

The parties of the second part jointly and severally covenant and agree to and with the parties of the first part, its successors and assigns, to keep up and maintain in good order and condition, by repairs and renewals, as the same may be needed, all the
558 present equipment of the party of the first part, and to add such new cars and engines as may be necessary to provide for waste and depreciation, as the same may from time to time occur; to mark distinctly and in the usual manner all such new locomotives and other rolling stock, to denote that they appertain and belong to the Ogdensburg and Lake Champlain Railroad Company, and so deliver them upon the road of the party of the first part as their property, subject only as their other property to the terms of this agreement, and all such rolling stock shall be so as aforesaid distinctly marked before leaving the machine shops or places of manufacture, and they will also put in the track of the party of the first part all new iron or a proportionate quantity of steel ties and other material requisite to keep the track and road always up in good condition, and not less than twelve hundred tons of good new iron as a minimum, in addition to all repaired iron in any year, and will increase the annual amount of new iron in proportion to the increase of the tonnage, in addition to all the repaired iron, and to add to the ballast every year so much as may be necessary to keep it in as good order as it now is, and to keep open and in good condition all the drains, and that all the railroad tracks, turnouts, docks, bridges, buildings, shops, tools, machinery, locomotives, cars, rolling stock, equipment, and everything herein named or not named which is taken, possessed, or controlled by the parties of the second part or any of them or any of their officers, successors, or assigns, by virtue of this contract, shall be kept in repair, restored, and returned to the party of the first part, its successors or assigns, in as good and serviceable condition as at the date when this agreement is to go into operation; also that no firewood or ties cut in either of the counties of St. Lawrence, Franklin, or Clinton shall be transported by the parties of the second part, without the consent of the parties of the first part, off from the Ogdensburg and Lake Champlain railroad, at less than the regular local price for lumber and bark from the same points.

Article V.

The said parties of the second part agree, jointly and severally, to and with the party of the first part, its successors and assigns, to pay to the treasurer of the party of the first part, at his office, in lawful currency of the United States, for the consideration herein mentioned, the sum of three hundred and eighty-four thousand six hundred and twenty dollars ($384,620) in each and every year for the term of three years from and after the first day of March next, and the sum of four hundred and fifteen thousand three hundred and ninety dollars ($415,390) each and every year thereafter for three years, and the sum of four hundred and forty-six thousand one hun-

dred and sixty dollars ($446,160) per annum thereafter so long as this contract shall continue, and each of the said payments
559 for each of the years shall be made in equal monthly payments, commencing on the first day of April in each year; and whereas the said amounts are intended to provide, among other things, for a dividend upon the common stock of the party of the first part and upon the outstanding second-mortgage bonds, which are by law convertible into such common stock, and the whole of said stock and outstanding bonds is three million seventy-seven thousand dollars; and whereas a portion of said bonds amounting to about twenty thousand dollars have not been converted and are lost or in the possession of parties unknown to the parties of this contract: Therefore it is agreed that all the dividends upon or in respect to said outstanding bonds which shall not be called for within ten days of the respective days of payments of dividends shall be refunded to the party of the second part, their successors or assigns, on demand, but if the dividends are lawfully demanded the parties of the second part shall pay the same, on demand, at any time thereafter.

Article VI.

The parties of the second part jointly and severally agree to and with the party of the first part that, in addition to the foregoing, they will pay all taxes and assessments which may be imposed by lawful authority upon the property, real or personal, the use and control whereof is hereby given to the parties of the second part, and also all United States Government taxes on the gross receipts on the road of the party of the first part, and upon all dividends and interest which may be paid by the party of the first part as they shall become due; that they will fulfil all obligations of the party of the first part specified in Schedule B, and assume all the obligations of the parties of the first part, either by statute or at common law, as common carriers, warehousemen, or otherwise, and will indemnify and save harmless the party of the first part from all costs, damages, or loss by reason of any failure to fulfil said obligations and by reason of any claim that may be made for any neglect, accident, or default happening upon or in connection with the road of the parties of the first part, and save the party of the first part and its successors and assigns from all loss, damages, cost, and expenses for or by reason of anything to be done or omitted on its part under its charter and existing laws from and after the day this contract goes into effect, except that this article shall not apply to any demand or claims against the party of the first part for past transactions or for anything for which the consideration is passed; and the parties of the second part and each of them shall have the right to use the name of the party of the first part in bringing any actions and in making any defences, and the parties of the second part will fulfil and perform all the covenants and agreements and obligations of the parties of the first part in respect to keeping up and main-
560 taining the equipment which is mortgaged or held in any way to secure the equipment bonds and other expenses connected therewith.

Article VII.

The said parties of the second part covenant and agree to pay, in addition to the foregoing, for the actual expenses of maintaining the organization of the Ogdensburg and Lake Champlain Railroad Company, not exceeding the sum of fifteen thousand dollars ($15,000) per annum, in equal monthly payments, it being agreed that the officers of the Ogdensburg and Lake Champlain railroad, whose compensation shall be paid therefrom, shall render such service and give such information connected with the business of the road as may be required of them.

Article VIII.

The said parties of the second part jointly and severally agree to and with the said party of the first part, its successors and assigns, to keep policies of insurance in full force and effect upon all the buildings, bridges, and docks of the party of the first part put in under this contract to the extent at least of two-thirds of their value, and to have such policies written for the benefit of whom it may concern, and referring to the interests of the parties hereto. They will also keep up and in good repair all buildings, docks, fences, and all other structures, and rebuild the same whenever burned or destroyed, and in case of loss all sums recovered from the insurance companies on existing or future policies shall enure to the benefit of the parties of the second part, and shall be expended in replacing or repairing the structures burned.

Article IX.

The parties of the second part shall, whenever requested by the party of the first part, furnish a car and transport therein the board of directors of the party of the first part, or a committee thereof, free of cost, over the road of the party of the first part and back, giving them suitable time and opportunity to examine and see that this contract is being fulfilled, not exceeding four times in any one year.

Article X.

All the tracks, buildings, bridges, locomotives, cars, and all rolling stock and all other property of the party of the first part the use whereof is taken by the parties of the second part shall, as soon as practicable, be carefully examined, inventoried, and described and appraised by two persons, one to be chosen by the Ogdens-
561 burg and Lake Champlain Railroad Company and one by the Vermont Central trustees; and if upon any point they differ they shall appoint an umpire, whose determination shall be conclusive; and at the termination of this contract an inventory and description and appraisal shall be made in the same manner of the same and substituted property by persons similarly appointed by said parties or their successors, who shall determine whether all such property is then in as good or better or worse condition of efficiency, and shall appraise the value of the difference, if any, and

the difference shall be equalized by payment from one party to the other, as the case may require.

If the two appraisers shall not agree within fifteen days on an umpire one shall be appointed by the supreme court of the State of New York, in the fourth judicial district, upon the application of either party, and if either party neglects for ten days after request to appoint an appraiser the other shall be appointed by said court. Said appraisals shall be made on the valuation in gold as a basis.

Article XI.

In case the party of the first part shall at any time consider that the parties of the second part have in substantial respect failed to fulfil the terms of this contract on their part the party of the first part may apply to the supreme court of the State of New York, upon affidavit and upon not less than thirty days' notice to the parties of the second part, to be served personally upon one of their managers or left at their principal office in Vermont, properly directed to such manager, for an order or injunction to restore the first party to the possession and control of all the property embraced in and under this contract, and if upon such application this court shall decide in their favor they shall be immediately restored to such possession, unless the parties of the second part shall, under the direction of said court, give to the first party full and ample security to pay any judgment which shall be obtained in any regular action which said first party may obtain for such failure to fulfil the terms of the contract aforesaid, together with any and all costs and expenses and reasonable charges of counsel by reason of such failure and full damages for any delay which may result to the first party by reason of deferred dividends or otherwise, including interest on deferred dividends, caused by the failure aforesaid, at the rate of eight per cent. per annum; and if, upon the final hearing of said application, the court shall determine adversely to the application of the said party of the first part, then the said party of the first part shall pay to the said party of the second part any and all costs growing out of said application and full damages which may result to the said parties of the second part in the premises.

562 The provisions of this section are not intended to limit or control any rights or remedies of either party growing out of any violation of the provisions of this contract by either party, but such rights and remedies shall remain open to either party as fully as they would be if the provisions of this section were omitted from this contract.

Article XII.

Each of the parties covenants to and with each of the others, jointly and severally, that they will hereafter and at all times make and execute all such further covenants and agreements as counsel learned in the law may advise necessary to carry into effect the true intent and purposes of this contract, and should any further legislation be deemed requisite will endeavor by all proper means to procure such legislation to carry this contract into effect and see that a

more perfect union may be made if it shall be found desirable for the promotion of their mutual interest; and the expense of all such proceedings, if done at the request of the parties of the second part, shall be paid by them. It is understood that in case of a large increase of the business of the Ogdensburg and Lake Champlain railroad requiring, in the estimation of both parties, increased facilities beyond those now existing, the Ogdensburg and Lake Champlain Railroad Company will, so far as they legally can, increase their capital stock or issue their bonds for the purpose of providing funds for such increased facilities, the parties of the second part paying the dividends on such stock or interest on such bonds at not less than eight per cent. per annum, free of Government tax.

This contract shall take effect and be in force from and after the date hereof and shall continue in force for the full term of twenty years from and after the first day of March, 1870, except that the gross earnings of the road between the date hereof and said first of March shall belong and be paid to said first party, said first party paying the expenses, and the specific compensation provided to be paid herein shall commence on said first day of March.

In testimony whereof John C. Pratt, president of the Ogdensburg and Lake Champlain Railroad Company, by the authority and direction of the board of directors, hath hereunto set his hand and the name of said company and affixed the seal thereof; and John Porter, the vice-president, and Samuel Atherton, of the directors of the Vermont and Canada Railroad Company, by the authority of the board of directors of said last-named company, have hereunto set their hands and the name of said company and affixed the seal thereof; and Lawrence Brainard and Joseph Clark, trustees, and John Gregory Smith, trustee and one of the managers, and Benjamin P. Cheney, one of the receivers and managers of the Vermont Central railroad, have hereunto set their hands and seals on
563 this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and seventy.

The foregoing document consists of twenty-three sheets, numbered from one to twenty-three consecutively.

[U. S. rev. stamp.]

The Ogdensburg and Lake Champlain Railroad Company, by
(Signed) JOHN C. PRATT, [SEAL.]
President.

[U. S. rev. stamp.]

The Vermont and Canada Railroad Company, by
(Signed) JOHN PORTER, [SEAL.]
Vice-President,
(Signed) and SAMUEL ATHERTON, *Director.*

The Trustees and Managers of Vermont Central and Vermont and Canada Railroads,
(Signed) J. GREGORY SMITH. [SEAL.]
(Signed) B. P. CHENEY. [SEAL.]

Sealed and delivered in the presence of—
(Signed) G. W. CUMMINGS, *Witness.*

DEFENDANTS' EXHIBIT 82. J. G. S., Ex'r.

(See deposition of C. E. A. Bartlett, answer to Int. 185.)

(Put in evidence, page 331.)

Contract between Northern Transportation Company and Vermont Central Line and Ogdensburg Railroad, March 1, 1871.

Articles of agreement between the Northern Transportation Company, of Ohio, a corporation established under the laws of Ohio, party of the first part; J. Gregory Smith, of St. Albans, Vermont, and George Stark, of Nashua, New Hampshire, parties of the second part, and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies, the Northern railroad, of New Hampshire (the Concord Railroad Corporation, of New Hampshire, provided they execute this agreement), the Nashua and Lowell Railroad Corporation, of New Hampshire and Massachusetts, and the Boston and Lowell Railroad Corporation, of Massachusetts, parties of the third part, and the Ogdensburg and Lake Champlain Railroad Company, the party of the fourth part.

Whereas the above-named railroad companies and trustees and managers which have become parties to agreements hereto annexed, bearing date the twenty-fourth day of February, A. D. 1870, and whose tracks form a large part of the connecting line be-
564 tween Boston, in Massachusetts, and Ogdensburg, in New York, depend largely for their business upon the regular transportation by steamers of freight and passengers between said Ogdensburg and the Western cities and towns upon the Great Lakes; and whereas the party of the first part was chartered to carry on the business of such transportation, but by reason of financial embarrassments is unable to carry it on efficiently, and it is feared that its steamers may be taken from this line; and whereas the parties of the third part and the parties of the fourth part believe it to be for their and the public interest to advance or lend to the parties of the second part some portion of the gross receipts for the transportion of freight and passengers, to be brought to and from their line by the steamers of the party of the first part, in order to secure the most regular, efficient, and permanent service by steamers between Ogdensburg and said Western cities and towns for the term of nineteen years from the first day of March, A. D. 1871; and whereas the parties of the second part have agreed to use all sums advanced or lent to them to secure the ownership or the control of the stock of said party of the first part, and otherwise to secure the most efficient management of its business to carry out the purposes of this agreement, and for no other purpose, and to hold all said stock which they may hold or control, and all other property or rights which they may purchase or otherwise acquire with said funds, except debts due from said party of the first part, in trust to secure

the repayment of all sums which may be so advanced or lent as aforesaid, with interest, as hereinafter provided:

Now, therefore, in consideration of the premises, it is covenanted and agreed between said parties as follows:

Article I.

That the party of the first part shall, during said term, continue to hold and own as many and as serviceable steamers as it now has, and will keep them properly equipped, seaworthy, and in good running order, and will make such addition to the number of said boats as the business shall require, and will run them for the transportation of freight and passengers between said Ogdensburg and said Western cities and towns, at such time and in such manner, and at such rate of freight and fare as shall be satisfactory to the executive committee of the parties of the third part for the time being; or, if there be no such executive committee or there is any legal impediment to their action, to the satisfaction of the presidents for the time being of the third and fourth parties or a majority of them; and that the party of the first part will keep all other property owned by it in good repair and in serviceable condition, and that, so far as may be practicable during said term, it will send all freight
565 and passengers for points east of Ogdensburg over the lines of the roads of the parties of the third and fourth parts.

A schedule of said steamers and other property is hereto annexed

Article II.

That the parties of the third part will, during said term, semi-annually, reserve out of the gross receipts, either upon said line or upon any roads now leased or operated, or which may hereafter be leased or operated, by the parties of the third part or either of them, for the transportation of freight and passengers brought to said line at Ogdensburg by the steamers of the party of the first part, the sum of one hundred and fifty thousand dollars, or so much thereof as shall be adequate for the purposes herein set forth, and pay over the same to the parties of the second part, to be used for the purpose of securing regular, efficient, and adequate service by the steamers to and from said Ogdensburg as aforesaid; and the party of the fourth part will, in case it shall be necessary to secure the regular and efficient running of said steamers to and from said Ogdensburg, when called upon by the parties of the second part, advance from time to time sums, not in all exceeding six hundred thousand dollars, to be used by said parties of the second part for the same purposes as said semi-annual payments, and to be *pro tanto* in lieu thereof, and to be repaid out of said semi-annual reservation, as hereinafter provided, it being understood and agreed that each of said parties of the third part shall be only liable to reserve and advance or pay to the parties of the second part or to the party of the fourth part, as the case may be, its share of such reservation, advance, or payment, to be ascertained by the proportion which said gross receipts of each of said parties bears to the entire amount of said gross receipts between Ogdensburg and points eastward upon the roads owned, leased, or operated by any of said third parties.

Article III.

That the parties of the second part shall hold all stock and rights to control stock of the party of the first part which they now have or shall purchase or acquire, and all other property or rights that may be purchased or otherwise acquired under this agreement, except debts due from the party of the first part as aforesaid, in trust to secure the repayment of all sums which the parties of the third and fourth parts, either or any of them, lend or advance under this agreement, and interest thereon at the rate of ten per cent. per annum, payable semi-annually, and shall apply all dividends which they shall receive on said stock and income from other property to repay the same; and in case said sums shall not all have been repaid,
566 with interest as aforesaid, on or before the expiration of said term, or at any time, in case of failure of the third parties or either of them to perform the stipulations of this agreement, then said parties of the second part shall, in case the parties hereto of the third and fourth parts shall not otherwise agree, sell said stock and other property, at public auction, in said Ogdensburg, after advertising the same for at least thirty days in some newspaper published in said Ogdensburg and a newspaper published in said Boston, and divide the net proceeds among the parties entitled thereto; but any change may at any time and from time to time be made in said trust funds, by sale, purchase, or otherwise, by said parties of the second part with the written consent of the presidents for the time being of the parties of the third and fourth parts.

That while the parties of the third part continue to pay the semi-annual interest to the party of the fourth part and the semi-annual payments to the trustees of the sinking fund, as herein provided, the parties of the second part shall pay any dividends or income which they may receive to the parties of the third part; but in case of any default on the part of the parties of the third part said dividends and income shall be paid directly to said Ogdensburg and Lake Champlain Railroad Company and to said trustees of said sinking fund in proportion to the amount of the semi-annual payments to them herein provided, and to be received by them *pro tanto* in place of said semi-annual payments.

Article IV.

That in case of vacancy in the number of the parties of the second part or their successors, by death, resignation, or otherwise, the party of the second part or his successors continuing in the trust may fill the vacancy, subject, however, to the approval of the parties of the third and fourth parts; and that the parties of the second part or their successors are to assume no personal liability to repay the money advanced by the parties of the third and fourth parts, but to apply the same according to the terms of this agreement, and to hold said stock, rights, and other property in trust and apply the same and the dividends thereon and income thereof as aforesaid.

Article V.

That in case the party of the fourth part shall advance any sum or sums amounting to six hundred thousand dollars or any part thereof, under this agreement, then the parties of the third part are to pay to the parties of the fourth part so much of said semi-annual payments reserved from gross receipts, as aforesaid, as will pay the semi-annual interest on said sum or sums so advanced by the
567 party of the fourth part, at the rate of eight per cent. per annum, and shall pay to the persons who may for the time being hold the offices of president and treasurer of the Boston and Lowell Railroad Corporation and of the Ogdensburg and Lake Champlain Railroad Company, as trustees, such sums semi-annually as will in the judgment from time to time of said two presidents and treasurers for the time being, when invested as a sinking fund, pay all excess of the advances of the party of the fourth part over five hundred thousand dollars within two years from the date hereof, and the remainder of the principal of said advances on or before the expiration of said term of nineteen years; and also such further sum semi-annually as will, when invested as a sunking fund, in the judgment of said two presidents and treasurers, as aforesaid, purchase the existing mortgage bonds of the party of the first part, amounting to four hundred thousand dollars, within ten years from the date hereof, which bonds so purchased shall be held by said trustees of the sinking fund for the security of the parties hereto as if held under article seventh of this agreement; and the said semi-annual payments are to be made to the party of the fourth part and to said trustees of said sinking fund in place of advances to the same amounts to the parties of the second part, as hereinbefore provided, and are to be ultimately repaid to the parties of the third part out of the dividends, income, and securities purchased or otherwise acquired by the parties of the second part, as herein provided, whether the same shall be held by them or transferred to the trustees of said sinking fund. In no case shall payments to a sinking fund be less than amounts which, invested at six per cent. per annum, will produce the sums to be paid out of such sinking fund.

Article VI.

That if at the end of said term the sums advanced to the parties of the second part under this agreement shall not have been repaid to the parties of the third part, with interest, as hereinbefore provided, from the dividends on the stock of the party of the first part, or otherwise, the party of the fourth part shall have the right for six months after the expiration of said term to purchase, at the actual cost thereof, from the parties of the third part one hundred and twenty four hundred and fourth parts of the claim for said advances, and in any event shall have a like proportionate interest on the same terms under any new arrangements which may be made, and a like proportionate interest in the securities for said claim, or in securities, property, or rights acquired under this agreement, on paying a like proportion of the cost thereof.

568 Article VII.

That it shall be the duty of the parties of the second part, if practicable, to procure an extension of the time of the payment of the mortgage bonds of the party of the first part which shall not have been purchased for the sinking fund for five years from the date of maturity; but if it shall be necessary, in order to secure the running of said steamers as aforesaid, for the parties of the second part to use any of the sums advanced to them as aforesaid to purchase or otherwise acquire any debts due from said party of the first part, whether secured by mortgage or not, said parties of the second part shall forthwith assign and transfer all said debts and all evidences thereof and all securities therefor to the persons who may for the time being be trustees of said sinking fund, to be held by them in trust, first to secure the repayment of all advances or loans made under this agreement by the party of the fourth part, and after the full payment of said advances or loans, with interest, as aforesaid, to the party of the fourth part, to secure the repayment of all sums paid, advanced, or lent under this agreement by the parties of the third part, with interest as aforesaid; and that as long as the semi-annual payments of interest shall be duly made by the parties of the third part to the party of the fourth part, and the semi-annual payment to the sinking fund, as provided in the fifth article of this agreement, said trustees may extend by renewals or otherwise the payment of both the principal and interest of said debts of said party of the first part, at their discretion, for a period not exceeding ten years from the date hereof; but in case of default by the parties of the third part to make said payments of interest and to the sinking fund, as provided in article fifth, said trustees of said sinking fund shall forthwith, if requested in writing by the party of the fourth part, proceed to collect said debts, and out of the sums collected pay from time to time said semi-annual interest, as provided in article fifth, to the party of the fourth part, and hold the balance, if any, as a part of said sinking fund; and that all of said sinking fund shall finally at the end of said term be applied to pay all advances made by the party of the fourth part; and if any balance shall remain the same shall be divided among the parties of the third part in such proportions as they shall be entitled to; and if said sinking fund shall prove insufficient the parties of the third part shall make up the deficiency out of gross receipts from said business brought by steamers as aforesaid.

Article VIII.

That the parties of the third part, in order to secure the payment to the party of the fourth part and to the trustees of the sink-
569 ing fund of the amount agreed upon semi-annually, as hereinbefore provided, will deposit with the manager of the Boston and Lowell Railroad Corporation, at Boston, or the person for the time being performing the duties now performed by said manager, before the last day of June and the last day of December of each year of said term, from funds in their hands received from

freights and passengers brought to or carried from the line aforesaid by the party of the first part, the amount of the semi-annual payments to be made to the party of the fourth part and to the trustees of said sinking fund; and the party of the fourth part and said trustees are hereby authorized to draw the same, on the first days of each of the following months, on the manager or other person, as aforesaid, who is hereby authorized to, and it is hereby agreed shall, make the payments in this article provided for out of sums so deposited; or, in case of failure to make such deposits, out of and to the extent of any funds in the hands of said Boston and Lowell Railroad Corporation collected in behalf of each of the parties of the third part from joint freight and passengers brought to and from the steamers of the party of the first part.

Article IX.

The trustees of said sinking fund shall invest the same, so far as shall be found to be reasonably practicable, in any mortgage bonds of the party of the first part and in the bonds of the party of the fourth part which shall be issued after the date hereof, which last-mentioned bonds, when so purchased, shall be canceled by said trustees of said sinking fund, and, when so canceled, be delivered to the party of the fourth part, and the party of the fourth part shall give a receipt for the amount of the bonds so canceled, and said receipt, filed with the trustees of said sinking fund, shall represent said sinking fund to the amount of the said canceled bonds; and if any other investment of said sinking fund shall be made by said trustees, special regard shall be had to the absolute safety of such investment.

The compensation of such trustees shall be fixed and paid by the parties of the third part, and said trustees shall annually make a written or printed report of their investments and doings to the parties of the third part and party of the fourth part, and such further special reports of such investments and doings as said parties of the third and party of the fourth part, or either of them, may require.

In witness whereof the said corporations, parties to this agreement, have respectively caused their corporate seals to be hereto affixed and these presents to be signed, executed, and delivered by their respective presidents hereunto duly authorized, and the
570 said trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies and the said J. Gregory Smith and George Stark have hereunto set their hands and seals, at Boston, in the Commonwealth of Massachusetts, this twenty-fourth day of February, A. D. eighteen hundred and seventy-one.

The Northern Transportation Company of Ohio,
(Signed) By P. CHAMBERLIN, *President.* [L. S.]

Ogdensburg and Lake Champlain Railroad Company,
(Signed) By JOHN C. PRATT, *President.* [L. S.]

The Nashua and Lowell Railroad Company, by their Committee thereto duly authorized,

(Signed) F. B. CROWNINSHIELD. J. G. ABBOTT. GEORGE STARK. } [L. S.]

The Boston and Lowell Railroad Company, by their Committee thereto duly authorized,

(Signed) By F. B. CROWNINSHIELD. J. G. ABBOTT. GEO. STARK. } [L. S.]

Trustees and Managers of Vermont Central and Vermont and Canada Railroads,

(Signed) By J. GREGORY SMITH. [L. S.]
J. GREGORY SMITH. } [L. S.]
GEO. STARK. }

Northern Railroad,

(Signed) By ONSLOW STEARNS. } [L. S.]
CHARLES F. CHOATE. }

DEFENDANT'S EXHIBIT 83. J. G. S., Ex'r.

(Put in evidence, page 347.)

(This paper is the same as so much of Defendants' Exhibit 80 as is printed on pages 550 to 553 of this volume to the signatures thereof, near the bottom of page 553, and so much of this Exhibit 83 is therefore not printed here. Commencing with the said signatures, the rest of this Exhibit 83 is printed, following this memorandum.

JOHN G. STETSON, *Clerk.*)

571 The Vermont and Canada Railroad Company, by [SEAL.]
JOHN PORTER, *Vice-President.*
SAM'L ATHERTON, *Director.*

The Trustees and Managers of Vt. Central & Vt. & Canada Railroads, [SEAL.]
J. GREGORY SMITH.
B. P. CHENEY.
L. BRAINARD.
JOSEPH CLARK.

The Boston & Lowell Railroad, by their Committee duly authorized,
F. B. CROWNINSHIELD.
J. G. ABBOTT.
GEO. STARK.

The Nashua & Lowell Railroad Corporation, by their Committee duly authorized,
F. B. CROWNINSHIELD.
GEO. STARK.

The Northern Railroad, by their Committee duly authorized,
ONSLOW STEARNS.
URIEL CROCKER.

In consideration of one dollar paid by the Ogdensburg and Lake Champlain Railroad Company, the receipt whereof is hereby acknowledged by the Vermont and Canada Railroad Company, *and* the trustees and managers of the Vermont Central railroad hereby assign and transfer to said Ogdensburg and Lake Champlain Railroad Company all their interest in the within written contract as collateral security for the performance on their part of all stipulations contained in the agreement, of even date herewith, between said Vermont and Canada Railroad Company and said trustees and managers and said Ogdensburg and Lake Champlain Railroad Company.

In witness whereof the said Vermont and Canada Railroad Company has caused its corporate seal to be affixed and this instrument to be signed by its vice-president and Samuel Atherton, one of its directors, and said trustees and managers have hereto set
572 their hands and seals this twenty-fourth day of February, A. D. one thousand eight hundred and seventy.

The Vermont and Canada Railroad Company, by
JOHN PORTER, *Vice-President.*
SAMUEL ATHERTON. [SEAL.]
Director.

[U. S. certificate stamp int. rev.]

The Trustees and Managers of Vt. Central & Vt. & Canada Railroads.

J. GREGORY SMITH. [SEAL.]
B. P. CHENEY. [SEAL.]
L. BRAINARD.
JOSEPH CLARK.

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

DEFENDANTS' EXHIBIT 84. J. G. S., Ex'r.

(Put in evidence, page 347.)

(This paper is the same as Exhibit 82, printed on pages 563 to 570 of this volume, to the signature thereof on page 570, and so much of this Exhibit 84 is therefore not printed here. Commencing with the said signature, the rest of said Exhibit 84 is printed following this memorandum.

JOHN G. STETSON, *Clerk.*)

The Northern Transportation Company of Ohio, by [SEAL.]
P. CHAMBERLIN, *President.*

Witness to signature of P. Chamberlin:
E. D. CHILD.

Ogdensburg and Lake Champlain Railroad Company, by [SEAL.]
JOHN C. PRATT, *President.*

Witness to signature of J. C. P.:
E. H. CHURCH.

573 The Nashua and Lowell Railroad Corporation, by their Committee thereto duly authorized,

F. B. CROWNINSHIELD.
J. G. ABBOTT. } [SEAL.]
GEORGE STARK.

The Boston and Lowell Railroad Corporation, by their Committee thereto duly authorized,

F. B. CROWNINSHIELD.
J. G. ABBOTT. } [SEAL.]
GEORGE STARK.

Northern Railroad,

ONSLOW STEARNS.
CHARLES F. CHOATE. } [SEAL.]

A true copy.
Attest: JOHN G. STETSON, *Examiner.*

DEFENDANTS' EXHIBITS 85 AND 86. J. G. S., Ex'r.

(Put in evidence, page 358.)

MEMORANDUM.—Subsequently to the introduction of these exhibits the parties agreed before the examiner that they should be withdrawn, and that the agreement following this memorandum should be substituted therefor.

Attest: JOHN G. STETSON, *Examiner.*

Agreement.

It is agreed that on the first day of October, 1858, the Lowell and Lawrence and Salem and Lowell Railroad Companies each executed to the Boston and Lowell Railroad Corporation a lease of their respective roads for the term of twenty years, and delivered up to the Boston and Lowell Railroad Corporation, its successors and assigns, full possession of said roads and of the property of each of said corporations of every description whatsoever, both real and personal, excepting only debts and claims then due. Each of said leases contained a provision that if the other lease should from any cause whatever be terminated or dissolved it should also be termi-
574 nated at the same time. Each lease also provided that the Boston and Lowell Railroad Corporation, lessee, should use, run, operate, manage, control, and administer the road and property of the lessor as fully as the lessor might do and in such manner as the lessee should determine; that the lessee might transport passengers, freight, and mails over and upon the road of the lessor, and do and transact any other business authorized by the charter of the

lessor, and that for such purposes and objects the lessor did thereby deliver up and entrust its railroad and other property to the lessee, and did delegate to it all its powers to manage and regulate the same and to collect tolls and income thereon for the sole benefit of the lessee.

Each lease also provided that the Boston and Lowell Railroad Corporation, its successors and assigns, should pay a fixed semi-annual rent for the leased property; should at its own cost and expense maintain the leased railroad, with all its real estate, embankments, bridges, tracks, depots, or other buildings, its rolling stock, and all other personal property, and return the same or similar property in lieu thereof at the end of the term; also that the lessee should pay all the taxes, should grant to the directors of the lessor free transportation during the term of the lease, and should save the lessor harmless from all suits, processes, costs, and expenses and damages incident thereto which shall arise in consequence of any accident happening on the railroad while in the hands of the lessee, or by reason of the running of the same, or from any act or neglect or doing of the lessee, and also provided that the lessee should annually make all such returns and specifications to the directors of the lessor as said directors might require to enable them to make all proper reports to the Legislature.

Each lease also contained a covenant on the part of the lessor that it would warrant and defend the lessee in the quiet possession and use of the leased road and property during the term, and that it would at its own cost and expense keep up its corporate organization and official board of directors during the term, and pass and perform all such official acts as might from time to time become necessary for the legal and proper management of the road and property.

575 And it is agreed that under said leases the Boston and Lowell Railroad Corporation entered into the possession of said leased property, and that when a majority of the stock of the leased roads was purchased by it, it had no other title or right to such possession than given by said leases.

F. A. BROOKS,
Solicitor for Plaintiff Corporation.
J. H. BENTON, JR.,
For Defendants.

DEFENDANTS' EXHIBIT 88. J. G. S., Ex'r.

(Put in evidence, page 333.)

Boston & Lowell Railroad Corporation, auditor's office.

B. F. Kendrick, auditor.

BOSTON, MASS, *Sept.* 23, 1885.

C. S. Mellen, Esq., gen. sup't.

DEAR SIR: In response to yours of the 19th inst., I hand you below a statement of the number of passengers to and from the Boston & Lowell and Nashua & Lowell railroads and roads above Nashua via and including the Concord railroad, viz:

In 1871, 169,589.
" 1872, 198,811.

Yours truly, B. F. KENDRICK, *Auditor.*

576 DEFENDANTS' EXHIBIT 87, J. G. S., EX'R; ALSO STATEMENTS,

Six months ending

DR. *Boston & Lowell Railroad in Account with*

1872.			
March 31.	To payments on account of Mystic River quay		$4,288 72
	" drafts on cashier		183,574 50
	" stock on hand Oct. 1st, 1871	$167,595 28	
	Decrease this six months	8,652 12	
	Balance to next six months		158,943 16
			$346,806 38

Six months ending with

DR. *Boston and Lowell Railroad in*

To premium paid on insurance		$45 00
" draft on cashier		174,549 54
" balance April 1st, 1872	$158,943 16	
Add pro. of increase in working material	11,728 15	
To balance October 1st, 1872		170,671 31
		$345,265 85

BEING DEFENDANTS' EXHIBIT SEMI-ANNUAL 577
J. G. S., EX'R.

with March 31st, 1872.

Boston & Lowell and Nashua & Lowell Railroads. CR.

1871.		
	By balance from previous six months----	$167,595 28
1872.		
March 31.	" rents collected by Whittaker----------	1,300 00
"	" Salem & Lowell R. R.----------	8,750 00
"	" Lowell & Lawrence R. R.----------	10,890 00
	" rent of houses on Andover street----	1,000 00
	" " cattle station----------	116 29
	" " land at Wilmington Junction--	20 00
	" " Lexington & Arlington and Stoneham R. R's----------	8,873 80
	" interest on investment, S. & L. and L. & L. R. R's----------	5,146 76
	Pro. of net earnings of six months-------	143,114 25
		$346,806 38

E. E. Settled as above.

T. H. WOOD,
Chief Clerk.

September 30th, 1872.

Account with George Stark, Manager. CR.

By working materials on hand April 1st, 1872------	$158,943 16
" Salem & Lowell R. R.----------	8,750 00
" Lowell & Lawrence R. R.----------	10,890 00
" interest on investment, S. & L. and L. & L. R. R's, to Oct. 1st, 1872----------	7,093 43
" interest on investment, Lexington & Arlington and Stoneham Branches, to Oct. 1st, 1872 ----------	9,569 51
" interest on $20,000, Winchester depot----------	700 00
" do. Mystic River R. R.----------	3,623 65
" do. $651,621.09, improvements at Boston--	20,013 27
" pro. of net earnings of six months to Oct. 1st, 1872-	125,682 83
	$345,265 85

578 Six months ending

DR. *Boston & Lowell R. R.*, DR.,

To payments on account of E. C. flats		$7,595 32
" premium on insurance		369 00
" payments on account of new bridge		3,143 47
" premium paid on insurance		1,000 00
" payments on account of new passenger bridge		3,030 68
" payment Feb. 15th, 1873, for widening Bridge street		2,676 81
" laying of third track from draw-bridge to Prison Point street, 2,128 feet, @ $2.00		4,256 00
" draft on cashier		175,715 10
" balance Oct. 1st, 1872	$170,671 31	
Deducted for decrease in stock	18,808 23	
Balance April 1st, 1873		151,863 08
		$349,649 46

Six months to

DR. *Boston & Lowell Railroad in Account with*

To M. W. Oliver, services	$500 00
" W. H. Foster, damages	500 00
" Drew & Coffin, sundries	29 28
" East Cambridge flats	269 28
" Reed Brothers, agent's premium	150 00
" Skillings & Co. for buildings—E. C. flats	4,500 00
" payments on ac. E. C. flats	183 27
" do. " do.	44 55
" do. " do.	805 87
" do. " do.	1,788 21
" do. " do.	345 95
" advertising (Journal)	7 50
" draft	171,103 91
Balance October 1st, 1873	180,698 82
	$360,926 64

March 31st, 1873. 579

To Geo. Stark, Manager. CR.

By working material on hand Oct. 1st, 1872	$170,671 31
" cash on ac. E. C. flats	7,595 32
" Salem & Lowell R. R.	8,750 00
" Lowell & Lawrence R. R.	10,890 00
" interest on sundry investments	48,042 60
" rent, cattle station-house, etc.	1,136 29
" pro. of net earnings	102,563 94
	$349,649 46

October 1st, 1873.

Boston & Lowell and Nashua Railroads.

By balance April 1st, 1873	$151,863 08
" Salem & Lowell R. R.	8,750 00
" Lowell & Lawrence R. R.	10,890 00
" interest on investments	56,008 92
" income and expenses of six months	128,417 54
" payment on ac. E. C. flats	4,997 10
	$360,926 64

E. E. Settled as above.

T. H. WOOD,
Chief Clerk.

580 Six months to

DR. *Boston & Lowell Railroad in Account with*

1874.			
April 1.	To sundry charges as per bill rendered		$1,410 44
	" engine-house extension at E. Cam.		8,000 00
	" draft by Geo. Stark, manager		203,258 35
	" balance, working materials		147,574.31
			$360,243 10

Six months ending

DR. *Boston & Lowell Railroad in Account with*

1874.			
May 30.	To 69 % $13,500.00 for 3 new pass'g'r cars		$9,315 00
June "	" payments on ac. E. C. flats		116 24
" "	" do. for engineer's services on plans		30 00
July 31.	" do. do. do.		85 00
" "	" do. on ac. E. C. flats		39 00
Aug. "	" engineer's services		33 00
Sept. 30.	" payments on ac. E. C. flats		5 00
" "	" do. for com. allowed E. B. Patch		25 00
" "	" do. engineer's services, Aug.		70 00
Oct. 31.	" do. do. do. Sept.		49 37
" "	" draft		156,298 83
	Balance working material on hand		187,223 94
			$353,290 38

April 1st, 1874. 581

Boston & Lowell and Nashua & Lowell Railroads. CR.

1874.		
April 1.	Balance from Oct. 1st, 1873	$180,698 82
	By cash	1,410 44
	" Salem & Lowell R. R. rent	8,750 00
	" Lowell & Lawrence "	10,890 00
	" rent of cattle station	116 29
	" do. " Andover-street house	1,000 00
	" do. " land at Wilmington Junc.	20 00
	" int. on S. & L. and L. & L. R. R. int.	5,475 59
	" " " Lex. & Arlington Br. R. R.	12,281 98
	" " " investment in Winchester depot	700 00
	" " " Mystic River R. R.	5,445 62
	" " " Boston improvements	35,318 56
	" income	98,135 80
		$360,243 10

E. E. Settled as above.

T. H. WOOD,
Chief Clerk B., L. & N. R. R's.

with Sept. 30, 1874.

Boston & Lowell and Nashua & Lowell Railroads. CR.

1874.		
April 1.	Balance from previous 6 months	$147,574 31
Sept. 30.	By cash	270 24
" "	do.	9,315 00
Oct. 31.	" Salem & Lowell railroad	8,750 00
" "	Lowell & Lawrence do.	10,890 00
" "	interest on investments in Boston improvements in Mystic River R. R. & L. & A. R. R.	68,328 73
" "	cash	157 37
"	Net earnings of 6 mos. to Oct. 1, '74	108,004 73
		$353,290 38

E. E.

T. H. WOOD,
Chief Clerk B., L. & N. R. R's.

582 Six months to

DR. *Boston & Lowell R. R. in Account with*

1874.			
October	31.	To charge in engineer's roll	$64 70
1875.			
January	1.	" timber, lumber, and iron work for widening ft. bridge at Boston	5,768 96
	"	" Russ & Lord, for labor	5,738 24
	30.	" lumber for Boston ft. bridge	3,263 03
February	28.	" payment on acc't of building bridge	86 40
May	15.	" draft in settlement of 6 mos. to April 1, 1875	54,045 88
		" pro. of deficit for 6 mos.	54,145 05
		" balance pro. of working materials on hand	166,648 53
			$289,760 79

Six months to

DR. *Boston & Lowell Railroad in Account with*

October	1.	To pro. of L. A. Roby's bill for piles and girders	$8,470 69
		" pro. of cost of 100 coal cars	19,320 00
		" " " Mystic wharf expenses, 6 mos. to date	9,865 38
		" pro. bridge over Pawtucket canal, Lowell	14,981 59
		" balance due in settlement of 6 mos.' acc't to Oct. 1, 1875	64,996 80
		" balance pro. of working material on hand	166,424 20
			$284,058 66

April 1st, 1875. 583

Boston & Lowell and Nashua & Lowell Railroads. CR.

1874.			
	Balance for 6 mos. to Oct. 1st, 1874		$187,223 94
1875.			
January 31.	" cash		11,571 90
	" Salem & Lowell R. R.		8,750 00
	" Lowell & Lawrence R. R.		10,890 00
	" rents		1,136 29
	" Boston improvements, 6 mos.' interest		42,009 28
	" Winchester " " "		700 00
	" Mystic River R. R. " "		8,114 15
	" Lexington & Arlington " "		11,155 17
	" Stoneham Branch		1,750 00
	" Lawrence Branch, interest		988 47
	" L. & L. and S. & L. investments		5,475 59
			$289,760 79

E. E. Settled as above.

T. H. WOOD,
Chief Clerk.

October 1st, 1875.

Boston & Lowell and Nashua & Lowell Railroads. CR.

October 1.	Balance from 6 mos. to April 1, 1875	$166,648 53
	By Salem and Lowell R. R.	8,750 00
	" Lowell & Lawrence R. R.	10,890 00
	" Boston improvements, interest	42,029 90
	" Winchester " "	700 00
	" Mystic River R. R. "	7,223 60
	" Lexington & Arlington R. R., interest	11,155 17
	" Stoneham Branch R. R. "	1,750 00
	" Lawrence Branch R. R. "	1,550 37
	" stock in Salem & Lowell and Lowell & Lawrence R. R's	7,103 59
	Net earnings, 6 mos. to Oct. 1, 1875	26,257 50
		$284,058 66

E. E. Settled as above.

MYRON TAYLOR,
Chief Clerk.

584 Six months to

DR. *Boston & Lowell Railroad in Account with*

To cost of survey of the Middlesex Central railroad	$14,585	53
" your pro. of joint material used in the construction of the Middlesex Central R. R. above the am't paid by said road	5,729	95
" your pro. of arrearage on Middlesex Central, rent for 18 months to Aug. 1, 1875	15,525	00
" your pro. of unsettled ledger balance with Wilton Stage Lines	2,909	12
" balance in settlement	147,293	08
" working material, April 1, 1876	114,741	39
	$300,784	07

Six months to

DR. *Boston & Lowell Railroad in Account with*

1876.			
Oct. 1.	To pro. of cost new rolling stock, 6 mos. to date	$12,227	08
	" pro. building bulkhead at Mystic	5,175	00
	" working material, Oct. 1st, 1876	129,750	75
	" balance in settlement	141,115	60
		$288,268	43

April 1st, 1876. 585

Boston & Lowell and Nashua & Lowell Railroads. CR.

By working material, Oct. 1, 1875		$167,218 17
" 6 mos.' rent of Salem & Lowell R. R.		8,750 00
" do. Low. & Lawrence "		10,890 00
" 1 year rent of cattle sta.		116 29
" " " " " Andover St. houses		1,000 00
" " " " " land at Wil. Junc.		20 00
" 6 mos.' interest to April 1 on $1,200,854.37, invested in Boston improvements		42,029 90
" ditto on $20,000 at Winchester		700 00
" " " $229,881.91 in Mystic Riv. R. R.		7,223 60
" " " $318,719.20 " Lex. & Arl. R. R.		11,155 17
" " " $50,000 " Stoneham Br. R. R.		1,750 00
" " " $44,336.46 " Lawrence " "		1,551 77
" " " $344,674.00 " Salem & Lowell and Low. & Law'ce R. R. stock	$12,098 59	
Less dividends received	7,030 75	
		5,067 84
Net earnings, 6 mos. to April 1, 1876		43,311 33
		$300,784 07

E. E. Settled as above.

MYRON TAYLOR, *Chief Clerk.*

October 1st, 1876.

Boston & Lowell and Nashua & Lowell Railroads. CR.

1876.			
Oct. 1.	By working material, April 1st, 1876		$114,741 39
	" 6 mos.' rent of S. & L. R. R. to Aug. 15, 1876		8,750 00
	" 6 mos.' rent of L. & L. R. R. to Oct. 1, 1876		10,890 00
	" interest paid and accrued in the following investments to Oct. 1, 1876, viz:		
	$1,200,854.37, Boston improvements		42,029 90
	20,000.00, Winchester "		700 00
	229,881.91, Mystic River R. R. "		8,045 86
	318,719.20, Lex. & Arlington " "		11,155 17
	50,000.00, Stoneham Br. "		1,750 00
	46,636.46, Lawrence " "		1,632 27
	345,674.00, Lowell & Lawrence and Salem & Lowell R. R. stock	$1,098 59	
	Less dividend	5,809 00	
			6,289 59
	Net earnings, 6 mos. to Oct. 1, 1876		82,284 25
			$288,268 43

E. E. Settled as above.

MYRON TAYLOR, *Chief Clerk.*

586 Six months to

DR. *Boston & Lowell Railroad in Account with*

1877, March 31:

To 69 % of payment to Northern R. R. in settlement of old claims, $35,750.00	$24,667 50
" working material on hand Apr. 1, 1887	102,005 19
Balance in settlement	156,019 61
	$282,692 30

Six months to

DR. *Boston & Lowell Railroad in Account with*

Oct. 1, 1877:

To 69 % of $28,307.02 expended in filling in Mystic river quay to date	$19,531 84
Working material on hand Oct. 1, '77	107,120 21
Bal. due in settlement	132,924 36
	$259,576 41

April 1st, 1877. 587

Boston & Lowell and Nashua & Lowell Railroads. CR.

1877, March 31:

By working material, October 1, 1876		$129,750 75
" 6 mos.' rent of Salem & Lowell road to Apr. 1,'77		8,750 00
" 6 mos.' rent of Lowell & Lawrence road to Apr. 1,'77		10,890 00
" 1 year's rent of cattle station to Apr. 1, '77		116 29
" 1 year's rent of Andover St. house		1,000 00
" " " " " Land at Wil. Junc.		20 00
" 6 mos.' interest on investments, as follows:		
$1,200,013.26, improvements in Boston		42,000 46
$20,000.00, improvements in Winchester		700 00
$229,881.91, Mystic River R. R.		8,045 86
$318,719.20, Lexington & Arlington R. R		11,155 17
$50,000.00, Stoneham Branch R. R.		1,750 00
$46,861.46, Lawrence Branch "		1,640 15
$345,674.00, L. & L. and S. & L. R. R. stock	$12,098 59	
Less dividend L. & L. R. R.	$1,221 00	
Less dividend S. & L. R. R.	4,995 00	
	6,216 00	
		5,882 59
Net earnings, 6 mos., to April 1, 1877		60,991 03
		$282,692 30

October 1st, 1877.

Boston & Lowell and Nashua & Lowell Railroads. CR.

Oct. 1, 1877:

By working material, April 1, 1877		$102,005 19
" six months' interest on investments, as follows:		
$1,200,013.26 in improvements in Boston		42,000 46
$20,000.00 in improvements in Winchester		700 00
$229,881.91 in Mystic River R. R.		8,045 86
$381,719.20 " Lex. & Arlington R. R.		11,155 17
$50,000.00 " Stoneham Branch R. R.		1,750 00
$46,861.46 " Lawrence Branch R. R.		1,640 15
$345,694.00 " L. & L. and S. & L. R. R. stock	$12,098 00	
Less dividends	5,809 00	
		6,289 59
Net earnings, 6 mos. to Oct. 1, 1877		85,989 99
		$259,576 41

E. E. Settled as above.

MYRON TAYLOR, *Chief Clerk.*

588 Six months to

DR. *Boston & Lowell Railroad in Account with*

April 1, 1878:

To 69 % $3,725.61 expended in Mystic River quay improvements	$5,706 37
" 69 % of $11,500.00 expended for 50 new dump cars	7,935 00
" working material on hand April 1, '78	143,413 71
Balance due in settlements	90,482 94
	$267,538 02

Six months to

DR. *Boston & Lowell Railroad in Account with*

Oct. 1, 1878:

To 69 % of amount expended at Mystic wharf, 6 mos. to date	$7,985 03
" 69 % of amount expended for new rolling stock, 6 mos. to date	8,770 34
" amount paid on ac. Salem & Lowell rent not chargeable to joint roads	2,187 50
" working material on hand Oct. 1, '78	109,948 89
" balance due in settlement	129,857 71
	$258,749 47

April 1st, 1878. 589

Boston & Lowell and Nashua & Lowell Railroads. Cr.

April 1, 1878:

By working material Oct. 1, 1877			$107,120 21
" 6 mos.' interest on investments, as follows:			
$1,200,013.26 in Boston improvements			42,000 46
$20,000.00 " Winchester improvements			700 00
$229,881.91 " Mystic River R. R.			8,045 86
$318,719.20 " Lex. & Arlington R. R.			11,155 17
$50,000.00 " Stoneham Branch R. R.			1,750 00
$46,861.46 " Lawrence Branch R. R.			1,640 15
$345,694.00 " L. & L. & S. & L. R. R. stock	$12,098 59		
Less dividends	6,216 00		
			5,882 59
" rent of cattle station, 1 year to date			116 29
" " " Andover St. house, 1 year to date			1,000 00
" " " land at Wil. Junc.			20 00
" net earnings, 6 mos. to Apr. 1, 1878			88,107 29
			$267,538 02

E. E. Settled as above.

MYRON TAYLOR,
Chief Clerk.

October 1st, 1878.

Boston & Lowell and Nashua & Lowell Railroads. Cr.

Oct. 1, 1878:

By working material April 1, 1878			$143,413 71
" mos.' interest on the following investments:			
$1,200,013.26 in Boston improvements			42,000 46
$20,000.00 " Winchester "			700 00
$229,881.91 " Mystic River R. R.			8,045 86
$318,719.20 " Lex. & Arlington R. R.			11,155 17
$50,000.00 " Stoneham Br.			1,750 00
$46,861.46 " Lawrence Br.			1,640 15
$345,674.00 " Low. & Lawrence & S. & L. R. R. stock	$12,098 59		
Less dividends	5,809 00		
			6,289 59
Net earnings, 6 mos. to Oct. 1, 1878			43,754 53
			$258,749 47

E. E. Settled as above.

MYRON TAYLOR,
Chief Clerk.

590 The following is the opinion of the court in accordance with which the demurrers of Charles E. A. Bartlett and of the Boston and Lowell Railroad Company to the amended bill of complaint, filed Nov. 9, 1883, were overruled March 25, 1884.

Circuit Court of the United States, District of Massachusetts.

NASHUA & LOWELL R. R. CORPORATION *et al.* v. BOSTON & LOWELL R. R. CORPORATION *et al.* } No. 1386, Equity Docket.

Opinion of the Court. (*March* 25, 1884.)

NELSON, *J.:*

The bill sets forth in substance that for the term of twenty years from and after October 1, 1858, the Nashua & Lowell railroad and the Boston & Lowell railroad were operated jointly under a pooling contract, by the terms of which both roads were to be placed under the control and management of a joint agent, to be appointed by the directors of the two corporations, and the joint earnings and expenses were to be shared in the proportion of thirty-one per cent. of the whole to the plaintiff and sixty-nine per cent. to the defendant corporation, the division to be made on the first days of April and October in each year; that the defendant Hosford was appointed and acted as the joint agent under the contract from April, 1875, until the expiration of the contract; that the defendant Bartlett, who was also the treasurer of the defendant corporation, was appointed and acted as cashier of the joint funds; that Hosford, while agent, had, in violation of the contract and without authority, paid over to the defendant corporation from the joint earnings large sums of money, amounting, as alleged, to $208,086.00, being thirty-one per cent. of the interest, reckoned at seven per cent., a year from 1872 to 1878 on the entire outlay of the defendant corporation in
591 the erection of new passenger stations in Boston and Winchester, in building the Mystic River railroad, and in purchasing certain shares of the Salem & Lowell and Lowell & Lawrence railroads (after deducting dividends on the shares), the whole of which expenditure was, by the terms of the contract, to be borne solely by the defendant corporation; that Bartlett, at the termination of the contract, in 1878, had in his possession as cashier the sum of $60,000 of the joint funds, thirty-one per cent. of which belonged, under the contract, to the plaintiff, and that, acting under the direction of the defendant corporation, he had refused to pay the plaintiff its share thereof, but had either retained such share in his own hands or had paid it over to the defendant corporation. The prayer of the bill was for an account.

The Boston & Lowell Railroad Corporation and Bartlett have demurred to the bill, assigning various grounds of demurrer.

By the familiar rules governing courts of equity the plaintiff is clearly entitled to equitable relief upon the case stated in the bill. The joint earnings of the roads constituted a trust fund in the hands

of the joint agent, to be held by him as a trustee for the benefit of the two corporations, and to be applied by him in the manner specified in the contract. A failure on his part to perform this duty rendered him liable to account to the party aggrieved. If, through the mistaken or wrongful act of the agent, the Boston & Lowell road has received a larger share of the net earnings than belonged to it under the contract, the plaintiff is at liberty to follow the fund into the hands of the defendant corporation and compel its restitution. If, as the defendants argue, the pooling contract was not within the corporate powers of the parties to it, that can afford no defence to the Boston & Lowell road when called upon to restore to the plaintiff the sums received in excess of its due share. As the contract has been fully executed and the defendant road has availed
592 itself of all the benefits to be derived from it, that corporation is now estopped to deny its validity. Still less can the agents of the parties set up a defence of this character which is not open to their principals.

Bartlett is properly joined as a defendant. The plaintiff is entitled to join as defendants with the defendant corporation all persons into whose hands it can trace any part of the funds of the joint management.

It has already been decided in this case that the plaintiff, as a corporation chartered by the laws of New Hampshire, can maintain this suit in this court against the defendants, who are citizens of Massachusetts, although the plaintiff is a part of a joint or consolidated corporation under the laws of New Hampshire and Massachusetts. 8 Fed. Rep., 458. Corporations thus created are separate for the purposes of jurisdiction and to enable each State to exercise control over the charters which it grants and over the acts of the corporation within its own limits; but the corporations are so far identical that they represent each other in suits by or against either of them, and the judgments or decrees will bind the whole corporation. Horne *v.* Boston & Maine R. R., 18 Fed. Rep., 50. The Massachusetts corporation is therefore not a necessary party to this bill.

The bill waives an answer under oath. By waiving the oath no discovery is sought, and it is not necessary to interrogate the defendants specially and particularly upon the statements of the bill. Equity rules, 40, 41.

The bill prays that the defendant corporation may answer by its president, J. G. Abbott. This must be regarded as mere surplusage and not as grounds of demurrer. The plaintiff is entitled to the answer of the corporation, but has no right to require that it shall answer by its president.

Demurrer overruled.

593 The following is the opinion of the court in accordance with which the final decree dismissing bill with costs was entered May 5, 1886:

Circuit Court of the United States, District of Massachusetts. In Equity.

NASHUA AND LOWELL RAILROAD COMPANY
v.
BOSTON AND LOWELL RAILROAD COMPANY *et al.* } No. 1836.

Opinion of the Court. (*May* 5, 1886.)

COLT, *J.:*

This bill in equity relates to certain transactions growing out of a joint-traffic contract entered into between the plaintiff and defendant corporations. The original contract was for three years, and was dated Jan. 29, 1857. By a supplemental contract, dated Oct. 1, 1858, the parties agreed to an extension for twenty years. The corporations entered into this contract for the promotion of their mutual interests through a more efficient and economical joint operation and management of their respective roads and for the better security of their respective investments, as well as for the convenience and interest of the public. By the terms of the contract the parties agreed to surrender to the joint management the entire control of their roads, shops, depots, and other property, reserving only such property as was afterwards specified in the contract. The parties assumed the joint expenses of operating the roads and
594 the expenses incident to the working of the Wilton and Stony Brook railroads connected with the Nashua and Lowell railroad; also, by supplemental agreement, the parties assumed the contracts existing between the Boston and Lowell and Salem and Lowell and Lowell and Lawrence Railroad Companies. They also assumed the contract existing between the Nashua and Lowell railroad and the Northern Railroad Company. They also provided that all contracts for the transportation of property or persons heretofore made by either party should be assumed and carried out by the joint parties, and that all separate contracts necessary for the ordinary operation of the roads then made by either party should be assumed by the joint parties and the expenses paid from the joint funds. The roads were to be managed by one agent, who should be chosen by the combined vote of a majority of the directors of each party. The income and expense accounts of the joint roads were to be made up by estimate at the close of each month and the net balance divided upon the basis agreed upon, subject to a final adjustment at the closing of accounts. It was further agreed that "on the first day of April and October in each year the said accounts shall be accurately closed up and balanced by settlement with each party and adjusting all previous payments and accounts," the Boston and Lowell Railroad Company receiving as its portion sixty-nine per cent. and the Nashua and Lowell Railroad Company thirty-one per cent. of the joint net income. It was further agreed that the indenture should be construed as a business contract solely, and in no sense a lease of one road to the other or as a union of the corporate

powers or privileges. All controversies arising under the contract at the request of either party were to be submitted to arbitrators.

After the roads began operation under the joint contract
595 large additions in mileage were made. The Stoneham Branch was purchased by the Boston and Lowell and the Peterboro' railroad was leased by the Nashua and Lowell. The Lexington and Arlington was purchased and the Middlesex leased by the Boston and Lowell. In the proper and legitimate development of the roads it became necessary to form connections with the upper roads, so called, which connected with the vast country lying to the north and west. The main outlet for this whole line of transportation was Boston. In order to retain the increasing business, as well as accommodate the wants of the public, it became necessary that the joint roads should offer increased facilities for the transportation of passengers and freight.

The facilities of the roads were increased in various ways. The directors of the Nashua and Lowell railroad appointed committees for the purchase of the Mystic River railroad, for the location of a new depot to be erected in Boston, and for the purchase of wharf, flats, and terminal facilities in Charlestown and for the providing of better terminal facilities in Boston. The joint roads united in the purchase of property at East Cambridge, storehouses and wharves on Lowell street, Boston, and the Mystic wharf property in Charlestown for the purpose of providing suitable accommodations for increased business. In these purchases the Boston and Lowell railroad bought sixty-nine per cent. and the Nashua and Lowell railroad thirty-one per cent. of the property.

The board of directors of the two contracting corporations were accustomed to hold their meetings at the station in Boston. Questions were put to both boards by the president of both boards. All questions in which there was any supposed separate interest or liability of the two corporations were put by the presiding officer, first to one board and then to the other. Each board had its own
596 separate clerk and book of records. The joint roads were operated under the contract until its expiration, in 1878.

The present suit relates to two transactions which took place under the joint contract—the building of the new passenger station in Boston, commenced in 1870 and completed in 1875, and the purchase of the stock of the Lowell and Lawrence and Salem and Lowell railroads. The plaintiff corporation now seeks to recover back its share of the joint receipts expended for these purposes on the ground that these acts were unauthorized and illegal under the joint-traffic contract.

It is clear from the evidence that, to meet the increased business of the joint roads and to retain their connection with other lines, it was the opinion of those charged with the management of the roads that increased terminal facilities at Boston were necessary. The Nashua and Lowell road, through its directors, participated in negotiations with the Eastern railroad to this end. Upon the rejection of the plan of a depot to be occupied jointly with the Eastern railroad the two corporations united to provide additional terminal facilities.

This subject was early brought to the attention of the stockholders of the Nashua and Lowell railroad, as appears by the record of the meeting of May 25, 1864, when the directors were empowered to invest the contingent fund of the corporation in lands, warehouses, or other real estate for the better accommodation of the business of the corporation, either upon the line of the road or at the Boston terminus. In 1869 the directors of both roads sent Gen. Stark, the joint manager, to Europe for the purpose of obtaining the best plans for the erection of a proper station in Boston. Upon the return of Gen. Stark plans for a new station were presented to the board of directors of the Nashua and Lowell railroad, and a report in rela-
597 tion to terminal facilities was made and accepted by the directors. The plans having been approved by both roads, the question arose as to the manner in which the Nashua and Lowell Company should bear its share of the expense.

On July 23, 1872, the directors of the Nashua and Lowell railroad voted as follows:

"That the expenditures made and to be made by the Boston and Lowell Railroad Company for land and buildings in Boston for a new station and the expenditures made and to be made by said corporation for the building and completing the Mystic River railroad and for the improvement in Winchester for a new station and land for railway purposes, to the amount of $20,000, are to be treated in the management of the business under the joint contract existing between said corporation and the Nashua and Lowell Railroad companies as follows, viz: The said Boston and Lowell Railroad Company are to be paid the interest upon such expenditures made and to be made, at the rate of seven per cent. per annum, at the end of six months, out of the receipts of the joint corporations under said contract, and which are to be charged as a part of the expenses of operating said railway under said contract; and the cashier of said two corporations and treasurer of the Boston and Lowell Railroad Company are hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston and Lowell Railroad Company out of the joint receipts of said two corporations."

On the same day the directors of the Boston and Lowell railroad passed a similar vote. In pursuance of this agreement the Boston and Lowell railroad borrowed the necessary funds, at seven per cent. interest, to construct the Boston station, and issued their bonds therefor for twenty years. The evidence shows that better terminal facilities in Boston were deemed vital to the interests of the joint roads; that the improvements were carried out with the utmost good faith on the part of both corporations; that the directors of the Nashua and Lowell railroad frequently discussed the
598 necessity of such increased terminal facilities, and finally agreed to the same without dissent, and that in the annual report adopted by the stockholders of the plaintiff corporation May 27, 1874, we find in the appendix thereto a full description of these improvements.

The second subject-matter of controversy concerns the purchase,

in the summer of 1871, by the defendant corporation on its separate account of a majority of the capital stock of the Salem and Lowell and Lowell and Lawrence railroads. By the contract of Oct. 1, 1858, the leases of these roads were assumed by the joint roads. It was believed, however, that these leases were without authority of law. It was therefore agreed by the joint corporations, through their respective boards of directors, that the Boston and Lowell railroad should purchase a controlling interest in these roads, and that the contracting parties during the continuance of the joint contract should share the excess of interest upon the purchase-money over the amount of dividends earned upon the purchased stock in the proportion of sixty-nine and thirty-one per cent. This arrangement, by which the Nashua and Lowell railroad assumed thirty-one per cent. of the cost during the continuance of the joint contract, was not confined to the building of the new station in Boston or the purchase of the Lowell and Lawrence and Salem and Lowell stocks, which the plaintiff in the present bill seeks to repudiate, but a like agreement was made as to the station at Winchester and the Mystic wharf and Mystic railroad improvements.

No objection was made by any director or stockholder of the plaintiff corporation to these acts until June 25, 1877, when, there having been a change in the board of directors, a vote was passed rescinding the vote of July 23, 1872, wherein it was provided that
599 the Boston and Lowell Company should receive from the Nashua and Lowell Company interest at seven per cent. upon thirty-one per cent. of the cost of certain additions made to the property of the Boston and Lowell Company. No attention was paid by the manager to this vote, but he continued to deduct from the joint receipts the amount due from the Nashua and Lowell Railroad Company on account of the improvements and purchases made for the joint interest. In 1878, at the annual meeting, the stockholders of the Nashua and Lowell Company passed the following resolutions:

"Resolved, That the stockholders of this company have learned with surprise, from the report of the directors this day presented, the fact of the vote passed at the directors' meeting holden July 23, 1872, and the result of that vote thus far in depriving this company of more than $150,000, and in bestowing the same upon the Boston & Lowell Railroad Company.

"Therefore resolved, That in our judgment this vote was passed in the interest of the Boston & Lowell Railroad Company and in entire disregard of the rights and interests of this company and of the terms and provisions of the joint-traffic contract itself.

"Resolved, That the directors this day elected are requested to take proper measures for restoring to the treasury of this company the sums so diverted from it by the Boston & Lowell Railroad Company."

In September, 1882, the two corporations entered into an agreement to submit their differences to arbitration. The plaintiff denies that any binding award was ever made.

Under these circumstances, can the plaintiff corporation recover

back the money which was deducted from the joint receipts during the continuance of the contract for its share of the expense for the construction of the passenger station at Boston and the purchase of the stock of the Salem and Lowell and Lowell and Lawrence railroads.

The plaintiff rests the right to relief on two general grounds:
600 First, that these acts were not duly authorized by the directors; and, secondly, that if so authorized the directors had no power to bind the corporation.

That the acts complained of were authorized by the directors of the plaintiff corporation we think there is no doubt upon the record before us. As to the building of the passenger station in Boston, we need only now refer to the vote of the directors, July 23, 1872; and in respect to the stock purchase, so called, it appears that the directors of both roads fully discussed the matter, that the purchase was determined upon, and that it was understood by all the directors that the excess of interest upon the sum paid for the stock above the dividends should be paid by both roads in the proportions fixed by the joint contract for the division of profits. It further appears that this matter was usually brought up in some form at the monthly meetings of the directors of both corporations, without objection from any director of the Nashua and Lowell road. Under these circumstances, to hold that the plaintiff corporation is not bound because the records of the corporation disclose no formal vote by the directors would be contrary to equity; but whatever informality exists in this respect, the subsequent acquiescence of the directors would bind the corporation if they acted within their powers. Cresswell *v.* Lanahan, 101 U. S., 347.

The main question raised in this case is whether the directors could bind the corporation in respect to the transactions complained of. The directors of a corporation, except so far as they may be expressly or impliedly restrained by the charter, by-laws, or general law, may do any act which the corporation itself can do or ratify. Wood's Railway Law, § 153. The general power of directors to perform all corporate acts refers to the ordinary business transactions of the corporation and not to fundamental and organic
601 changes like increasing its capital stock or leasing its plant. Railway Co. *v.* Allerton, 18 Wall., 233; Thomas *v.* Railroad Co., 101 U. S., 71; Cass *v.* Manchester Iron and Steel Co., 9 Fed. Rep., 640. But the agreements entered into by the plaintiff corporation respecting the Boston passenger station and the purchase of the railroad stock were not of this fundamental character. The plaintiff corporation did not furnish the money for these purposes. All it agreed to do in return for the mutual benefits conferred was to pay an amount equal to the interest on thirty-one per cent. of the cost during the continuance of the contract. Independently of the traffic contract, or as supplementary thereto, we fail to see why the directors had not the power, if they deemed it for the best interest of the corporation, to make these agreements.

To meet the increased business of the joint roads it was found necessary to lease other lines, to increase the terminal facilities at

various points, and to make contracts with connecting lines. Sometimes this was done by each of the joint roads separately, sometimes jointly; but all the numerous and various plans which were carried out during the twenty years of the contract appear to have been done in good faith and for a mutual benefit, and without objection from any one, until a change of management took place in the plaintiff corporation, two years before the expiration of the contract. Under these circumstances, it may be said the acts complained of were incidental to the original contract, or, if not strictly incidental, that they were necessary to the proper carrying out of the contract to the best advantage of the joint roads and of the public. The acts complained of were not the only ones of their kind, but the record discloses other transactions of a similar or nearly similar character, about which no complaint is made. Under the circumstances presented in this case, we think the directors acted within their powers, and that
602 their acts bound the plaintiff corporation. Aside from this, there is much evidence going to prove that the stockholders ratified the acts of the directors. We are aware that this is disputed by the plaintiff largely on the ground of the manner in which the accounts were kept. Upon the whole, we think the evidence goes to show such an acquiescence on the part of the stockholders as forbids them, after this lapse of time, from holding the defendant liable. Again, this contract has been executed. It expired in 1878. The Supreme Court says, in Thomas *v.* Railroad Co., 101 U. S., 71, 86: "In regard to corporations, the rule has been well laid down by Comstock, C. J., in Parish *v.* Wheeler (22 N. Y., 494), that the executed dealings of corporations must be allowed to stand for or against both parties when the plainest rules of good faith require it." The plaintiff relies on the case of March *v.* Eastern Railroad Co., 43 N. H., 515. In that case one road was leased to the other upon certain terms, and then a change of policy was pursued by the lessee, which operated to destroy the benefit or profit which would properly accrue to the lessor under the lease. Whatever dicta favorable to the contention of the plaintiff may be found in the case the facts are so different that we cannot consider the case as applicable to the present one.

These conclusions make it unnecessary to consider the other questions raised.

Bill dismissed.

603 UNITED STATES OF AMERICA, } *ss*;
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause in equity entitled Nashua & Lowell R. R. Corporation *et al.*, complainants, *v.* Boston & Lowell R. R. Corporation *et al.*, defendants, lately determined in said circuit court, and of the proceedings therein and of the opinions of the court filed therein.

In testimony whereof I hereunto set my hand and affix the seal

Seal of the Circuit Court, Massachusetts.

of said circuit court, at Boston, in said district, this seventh day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

JOHN G. STETSON, *Clerk.*

604 (*Bond to Party on Appeal.*)

Know all men by these presents that we, The Nashua & Lowell Railroad Corporation, as principal, and Francis A. Brooks and Francis V. Parker, both of the city of Boston, as sureties, are held and firmly bound unto the Boston and Lowell Railroad Corporation, Charles E. A. Bartlett, George F. Richardson, Rebecca T. Hosford, and Arthur G. Pollard in the full and just sum of twelve hundred dollars, to be paid to the said corporation, the said Bartlett, Richardson, Hosford, and Pollard, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twelfth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a term of the circuit court of the United States for the district of Massachusetts begun on the fifteenth day of October, A. D. 1885, in a suit in equity depending in said court between The Nashua and Lowell Railroad Corporation, as plaintiff, and the said Boston and Lowell Railroad Corporation and the said Bartlett, Richardson, Hosford, and Pollard, as defendants, a decree was rendered against the said Nashua and Lowell Railroad Corporation, plaintiff as aforesaid, and the said plaintiff, at the same term of said court, having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of—

NASHUA & LOWELL RAILROAD CORPORATION, [L. S.]
By CHAS. B. BROOKS, *Treasurer.*
FRANCIS A. BROOKS. [L. S.]
FRANCIS V. PARKER. [L. S.]

Approved.

LE BARON B. COLT,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the

office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

605 *Stipulation for Abridging the Record, &c.*

Supreme Court of the United States.

NASHUA & LOWELL RAILROAD CORPORATION, Appellant,
vs.
BOSTON & LOWELL RAILROAD CORPORATION *et al.* } No. 441.

It is agreed that the clerk of this court, in printing the record for hearing in this court on appeal, shall omit so much of the matter contained in the transcript of record sent up by the clerk of the circuit court for the district of Massachusett as is herein below designated and described, to wit:

The first 36 pages of said transcript, except page 1 containing the caption of said cause.

That portion of the bill of complaint making the first twelve lines of original page 46 of said transcript, and the 19th, 20th, 21st, 22nd, 23rd, 24th, and 25th lines of original page 47.

Original pages 61–63 and 65 of said transcript, containing the demurrers of the Boston & Lowell R. R. Co., C. E. A. Bartlett,
606 and motion of plaintiff below to strike out same, and so much of page 67 as contains the answer of C. E. A. Bartlett; so much of page 72 (originally page 34) as contains the plaintiff's replication to answer of Bartlett.

So much of the answer of the Boston & Lowell R. R. Co. on originally printed page 42 as made the 29th and 30th paragraphs or divisions of said answer.

So much of the same answer on original page 46 as made the 36th or last paragraph of said answer; also the last ten lines of said original page 46 and the first three lines of page 47.

Exhibit 2, being the first four lines of page 77, as originally printed in circuit court.

The lower part of page 79 and the whole of page 80, being sections 3 and 4 of plaintiff's by-laws.

The four bottom lines of page 82

The last six lines of page 256 and the twenty following pages, Nos. 257 to 276, inclusive, being deposition of Charles B. Brooks.

The first five lines of page 277.

The last eight lines of page 303.

The first four lines of page 304 and so much of the lower
607 portion of page 304 as contains the 51st and 52nd interrogatories and answers thereto.

The lower part of page 308 and upper part of page 309, or so much of cross-examination of witness Bartlett as precedes the 81st cross-interrogatory.

The last seven lines of page 382 and all after page 382 to page 395, except the last ten lines of page 394.

Page 473 and the first ten lines of page 474.

All of page 491 except the first seven lines.

All of page 497 except the first seven lines.

Pages 498 to 508, inclusive, except the last seven lines of page 508.

The last ten lines of page 509 and page 510.

The last four lines of page 511.

Pages 512, 513, 514, & 515, except the last nine lines of page 515.

Pages 516 and 517, except the last four lines of page 517.

The lower half of page 518, commencing "on motion of B. F. Clark," and the whole of page 519.

The middle of page 520, or that portion between the words "placed on file" and the words "Col. John H. George."

608 The oath of E. P. Emerson, clerk, on page 521.

All of page 522 except the last four lines.

All of page 523 except the first ten lines.

The upper half of page 524—*i. e.*, all before the record of the stockholders' meeting.

The whole of pages 525 and 526 and the first seven lines of page 527.

All below the middle of page 528, commencing with "the whole number of shares," except the four last lines.

All of page 529 except the last four lines.

All of page 531 except the resolution introduced by Perley Dodge, and passed.

The first three lines of page 532.

Pages 533 to 538, both inclusive.

F. A. BROOKS,
Solicitor for the Nashua & Lowell R. R. Corporation, Appellant.
J. W. BENTON, JR.,
Solicitor for Boston & Lowell Railroad Corporation.

[Endorsed:] Office Supreme Court U. S. Filed Nov. 15, 1888. James H. McKenney, clerk.

609 [Endorsed:] Supreme Court U. S. 1888, October term. No. 166. The Nashua and Lowell R. R. Co., app't, *vs.* The Boston & Lowell R. R. Co. *et al.* Stipulation in regard to printed record. Filed Nov. 15, 1888.

Endorsed on cover: Massachusetts C. C. U. S. No. 166. The Nashua & Lowell Railroad Corporation, appellant, *vs.* The Boston & Lowell Railroad Corporation, Charles E. A. Bartlett, and George F. Richardson, Rebecca T. Hosford, and Arthur G. Pollard, executors of Hocum Hosford, deceased. Filed October 12, 1886.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

NASHUA & LOWELL RAILROAD CORPORATION

v.

BOSTON & LOWELL RAILROAD CORPORATION ET AL.

BILL OF COMPLAINT.

(PARTS NOT MATERIAL ARE OMITTED.)

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

Your orator, the Nashua & Lowell Railroad Corporation, a corporation duly established and existing by the laws of the State of New Hampshire, and a citizen of said State of New Hampshire, brings this its Bill of Coinplaint against the Boston & Lowell Corporation, a corporation duly established by the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, and against Hocum Horsford and Charles E. A. Bartlett, of the city of Lowell, also citizens of said State of Massachusetts.

And thereupon your orator complains and says, that said Nashua & Lowell Railroad Corporation is, and for many years has been, a corporation under the laws of the State of New Hampshire, owning a railroad extending from Nashua, in New Hampshire, to Lowell, Mass.; and said Boston &

Lowell Railroad Corporation is, and for many years has been, a corporation under the laws of said State of Massachusetts, owning a railroad extending from said Lowell to the city of Boston, Mass.

And your orator shows that in the year 1858 said Nashua & Lowell and Boston & Lowell Railroad Corporations entered into a contract in writing with each other, by which it was agreed that the possession, control and management of these two railroads, and the business traffic thereof, should be turned over or committed to a single person, to be selected by a vote of each of the two Boards of Directors of said corporations, as an agent or manager of both said railroads, for the term of twenty years, unless or until he should be displaced as such agent either by a majority of votes of both of said Boards of Directors or by a unanimous vote of said Boards of Directors; and your orator shows that the intent of such arrangement was to combine or associate together the said corporations as copartners with each other in respect to both the earnings and expenses of traffic of both of them and the control and management of the two roads, for twenty years from Oct. 1, 1858, it being provided by said contract that the Nashua & Lowell Railroad Corporation should share in the earnings and expenses of both roads to the extent of thirty-one per cent of the whole, and that the Boston & Lowell Railroad Corporation should share therein to the extent of sixty-nine per cent of the whole; a copy of which contract your orator will produce in court and read in evidence at the hearing of this cause. * * *

NASHUA & LOWELL RAILROAD CORPORATION.

By its President, F. A. Brooks.

AGREEMENT.

And now comes the plaintiff and files, as part of the amended bill, the copy of the contract referred to in said bill, and the said copy is hereto annexed, marked "A." And it is agreed that the said copy is a correct copy of a contract made by the plaintiff and defendant corporations, and that the same may be used in this suit for all purposes for which the original contract might be used if duly produced and proved; and it is agreed that said contract "A" may be taken as a part of said bill of complaint in the same manner as if the same had been originally filed with said bill, and made a part thereof.

F. A. BROOKS,
Solicitor for Plaintiff.

S. A. B. ABBOTT,
Solicitor for Boston & Lowell R. R. Co.

DEFENDANT'S PLEA.

The joint and several plea of the Boston & Lowell Railroad Corporation, Hocum Horsford and Charles E. A. Bartlett, defendants to the amended bill of complaint of the Nashua & Lowell Railroad Corporation, Jeremiah W. White, Cornelius V. Dearborn and Erastus B. Hammond.

These defendants, by protestation, not confessing or acknowledging the matters and things in and by said amended bill set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said amended bill, say that this Court ought not to take further cognizance of or sustain the said bill of complaint, because they say that they, the

said defendants, at the time of filing said bill, were and still are all, each and every one citizens of the State of Massachusetts, and that said plaintiffs, at the time of filing said bill, were not and still are not all, each and every one citizens of another State, but that the said Nashua & Lowell Railroad Corporation, one of said plaintiffs, at the time of filing said bill, was and still is a corporation duly established and existing under and by virtue of the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, and, at the time of filing said bill, was not and still is not a corporation established and existing by the laws of the State of New Hampshire, and a citizen of said State of New Hampshire. All of which matters and things these defendants do aver to be true and are ready to verify. Wherefore they plead the same to the whole of said amended bill, and pray the judgment of this honorable Court whether they should be compelled to make any other or further answer to said bill. And the said defendants further pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

THE BOSTON & LOWELL
RAILROAD CORPORATION,
By J. G. ABBOTT, *its President.*
HOCUM HORSFORD,
By S. A. B. ABBOTT, *his Attorney.*
C. E. A. BARTLETT.

ANSWER OF HOCUM HORSFORD'S EXECUTORS.

(PARTS NOT MATERIAL OMITTED.)

The Answer of GEORGE F. RICHARDSON, REBECCA T. HORSFORD *and* ARTHUR G. POLLARD, *Executors of the last will and testament of* HOCUM HORSFORD, *deceased, one of said Defendants to the Bill of Complaint.*

And now the said Richardson, Horsford and Pollard, executors as aforesaid, come, and for answer to said bill of complaint, or to so much thereof as they are advised it is material or necessary for them to answer, say that they are informed and believe that the said Hocum Horsford, on or about the thirteenth day of July, A. D. 1875, was appointed the joint agent or manager of the Boston & Lowell Railroad Corporation and the Nashua & Lowell Railroad Corporation, for the purpose of managing said two railroads, under and in pursuance of the contract referred to in said bill of complaint; but these defendants, on their information and belief, deny that he became such manager for the purpose of taking and paying over the net earnings of said railroads under and in pursuance of said contract, or that any of the net earnings of said railroads came into his hands as such agent or manager, or that as such agent he became bound to administer and account for the net earnings of said railroads.

. . . . . .

And these defendants, without waiving any of the defences herein set out, further answering, say, that the Boston & Lowell Railroad Corporation is a corporation chartered by the Commonwealth of Massachusetts, and duly exists by

virtue of the laws thereof, and is a citizen of said Commonwealth, and that all the defendants named in said original complaint and these defendants are also citizens thereof; and that the Nashua & Lowell Railroad Corporation was originally chartered by the State of New Hampshire on the twenty-third day of June, A. D. 1835, by an act which authorized the construction of a railroad from Nashua, in said State, to the State line of the Commonwealth of Massachusetts, a distance of about four miles; that on the tenth day of April, A. D. 1838, the Commonwealth of Massachusetts granted a charter authorizing the construction of a railroad from the State line in New Hampshire, at the termination of the said Nashua & Lowell Railroad in New Hampshire to Lowell, in said Commonwealth, a distance of about eleven miles; that in the year 1838, the Legislatures of Massachusetts and New Hampshire authorized the union of these two corporations in one, and they were so united, and as such united corporation, they issued common stock, constructed said railroad from Lowell aforesaid to said Nashua, and have always operated the same as one corporation; and said united corporation is the complainant in said bill of complaint, and the same with which the contract with the Boston & Lowell Railroad Corporation, referred to in complainant's bill of complaint, was made; and these defendants allege that, if any claims can be maintained upon the facts alleged in said bill of complaint, they can only be maintained by virtue of the contract between the Boston & Lowell Railroad Corporation, a citizen of Massachusetts, and the Nashua & Lowell Railroad Corporation, united as aforesaid, citizens of Massachusetts and New Hampshire, and the Nashua & Lowell Railroad Corporation of Massachusetts, a citizen of Massachusetts, should be made a party to this bill.

Whereupon these defendants pray that they may be discharged and for their costs.

GEORGE F. RICHARDSON,
ARTHUR G. POLLARD,

Executors of the last will and testament of Hocum Horsford.
for themselves and Rebecca T. Horsford, co-executor.

DEMURRER OF THE BOSTON & LOWELL RAILROAD CORPORATION TO THE AMENDED BILL OF COMPLAINT.

The Boston & Lowell Railroad Corporation, one of the defendants named in the complainant's bill of complaint, not confessing any or all of the matters and things in the said bill of complaint as amended to be true in the manner and form therein set forth and alleged, doth demur to said bill as amended, and for cause of demurrer showeth: —

First. The plaintiff has not in its said bill of complaint made or stated any case that entitles it to the discovery or relief prayed for, or to any discovery or relief from this defendant as to the matters contained in said bill or any of such matters.

Second. It appears by said bill that the complainant has a full, complete and adequate remedy at law for all the claims, matters and things therein set forth.

Third. It appears by said bill that it is exhibited against this defendant and against the other defendants therein named for distinct matters and causes, in several of which this defendant is in no wise interested or concerned either severally or jointly with the other defendants or either of them, and that said matters and causes are in no wise

dependent upon each other, and that the bill is altogether multifarious.

Fourth. It appears by said bill that the defendants, Charles E. A. Bartlett and Hocum Horsford, are not, either together or separately, liable, interested or concerned with this defendant in any cause of action, matter or thing charged against this defendant; and that they are wrongfully and improperly joined and made parties defendant with this defendant.

Fifth. In said bill, the complainants pray that certain interrogatories shall be answered and certain discoveries made personally by Josiah G. Abbott, who is alleged to be president of this defendant corporation, although said Abbott is not made a party to the bill; and certain discoveries are asked for from said Abbott and this defendant by the complainant, who at the same time expressly waives the oath to the answers in which the discoveries asked for are to be made.

Sixth. It does not appear in said bill that the complainant has any separate interest or any interest in the contract or agreement set forth in the bill under and by virtue of which alone it is sought to charge this defendant in this cause, and to enforce which alone this bill is exhibited.

Seventh. It appears in said bill that, if the plaintiff has any interest in the agreement or contract set forth in the bill, it has such interest jointly with the Nashua & Lowell Railroad Corporation, a corporation chartered by the laws of the Commonwealth of Massachusetts, and a citizen of said Commonwealth ; that said last-named corporation is a necessary party plaintiff in this bill; that said last-named corporation s not joined in this bill, and that discovery and relief prayed for in the bill cannot be decreed, if at all, until said last-named corporation is joined with the complainant.

Eighth. The interrogating part of the bill is not drawn in accordance with rules of this court, and is wholly informal.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur thereto, and humbly demands the judgment of this Court whether it shall be compelled to make any other or further answer to said bill of complaint, and prays to be hence dismissed with its costs and charges in this behalf sustained.

S. A. B. ABBOTT,
Of Counsel for Defendant Corporation.

ANSWER OF BOSTON & LOWELL RAILROAD CORPORATION.

[PARTS NOT MATERIAL OMITTED.]

And now comes the Boston & Lowell Railroad, one of the defendants, and reserving to itself all and all manner of benefit or advantage of exception that can or may be had to the manifold uncertainties, errors, omissions and imperfections in the bill of complaint as amended, answers to so much thereof as it is advised it is material and necessary to make answer, as follows: —

First. It denies that the plaintiff is a citizen of the State of New Hampshire; but avers that it is a citizen of the State of Massachusetts.

Second. It admits and avers that all the defendants are, and at the time of filing the bill of complaint were, citizens of the State of Massachusetts.

Third. It denies that the Nashua & Lowell Railroad Corporation is, or for a great number of years has been, a corporation under the laws of the State of New Hampshire, owning

a railroad extending from Nashua, in New Hampshire, to Lowell, Massachusetts; but it admits and avers that the defendant corporation is, and for a great number of years has been, a corporation under the laws of the State of Massachusetts, owning a railroad extending from said Lowell to the city of Boston, Massachusetts; and it further avers and alleges that by an act of the Legislature of the State of New Hampshire, and by an act of the Legislature of the Commonwealth of Massachusetts, the former enacted on the twenty-sixth day of June, A. D. 1838, and the latter enacted on the tenth day of April, A. D. 1838, the said Nashua & Lowell Railroad Corporation, created by the laws of the State of New Hampshire, and the Nashua & Lowell Railroad Corporation, created by the laws of the Commonwealth of Massachusetts, were united and made one corporation, and that said two last-named corporations accepted said acts of said two States, and organized under the same, and constructed and owned a railroad extending from Nashua, in the State of New Hampshire, to Lowell, in Massachusetts; and this defendant avers that the said Nashua & Lowell Railroad Corporation, created by the laws of New Hampshire, never owned a railroad extending as aforesaid from Nashua to Lowell, and never made the contract set forth in the complainant's bill of complaint and made a part thereof; but it alleges and avers that said contract was made by the corporation created by the laws of the State of Massachusetts and the laws of the State of New Hampshire, and this defendant annexes copies of said four acts of the Legislatures of New Hampshire and Massachusetts, and makes them a part of this answer.

Fourth. It denies that it ever entered into any joint traffic contract with the Nashua & Lowell Railroad Corpo-

ration, a corporation existing under the laws of the State of New Hampshire; but it says that it made and executed with the Nashua & Lowell Railroad Corporation, a corporation duly established by the laws of the State of Massachusetts, and the Nashua & Lowell Railroad Corporation, a corporation duly established by the laws of the State of New Hampshire (which were united as hereinbefore alleged and set forth), a joint traffic contract; and it admits that the copy filed in this court on the sixth day of November, 1883, and made part of the amended bill of complaint, is a true copy of said contract.

. . . . . .

The defendant says, upon its information and belief, that all the directors of the plaintiff, present at the meeting when said vote was passed, and being a quorum of the said directors, voted for said vote, but has no knowledge or belief at this time of the names of such directors.

The defendant has no information upon which it can found a belief upon the question whether the meeting at which said vote was passed was held at Young's Hotel, and therefore requires the plaintiff to prove its allegation in that behalf, if it is deemed material.

THE BOSTON & LOWELL
RAILROAD CORPORATION,
By C. E. A. BARTLETT, *Treasurer.*

COMPLAINANTS' EXHIBIT TRANSCRIPT OF RECORD, NO. 1, J. G. S., EX'R.

STATE OF NEW HAMPSHIRE,
HILLSBOROUGH, ss.

At Abbot & Fox's office, in Dunstable, in said county, on this day, being Tuesday, the seventh day of July, in the year of our Lord eighteen hundred and thirty-five, at three o'clock in the afternoon, appeared Daniel Abbot, Ira Gay, Benjamin F. French, Peter Clark, John M. Hunt and Charles J. Fox, being all the persons named in an Act of the General Court of the State of New Hampshire, passed and approved the twenty-third day of June, in the year of our Lord eighteen hundred and thirty-five, entitled "An Act to incorporate the Nashua and Lowell Railroad Corporation," the aforenamed persons being all that are associated or interested therein, except Jesse Bowers, and thereupon said act and the warrant calling the first meeting being read, the said persons do agree to accept said act of incorporation, and to organize the corporation, and fulfil the object thereof as soon as may be, and in testimony of such acceptance the said persons do hereunto respectively sign and subscribe their names.

IRA GAY.
DAN'L ABBOT.
BENJ. F. FRENCH.
PETER CLARK.
CHARLES J. FOX.

And the said Jesse Bowers hereby agrees to and ratifies the same.

JESSE BOWERS.

And thereupon it is voted to choose a moderator to govern this meeting, and having proceeded to make such choice, Ira Gay, Esq., was duly chosen.

And thereupon it was voted to elect a clerk of said corporation agreeably to the charter, and having proceeded by ballot to make such choice, Charles J. Fox, Esq., is found duly elected.

And thereupon it is proposed that the said Charles J. Fox do take and subscribe the following oath of office: —

I, Charles J. Fox, being duly chosen clerk of the Nashua & Lowell Railroad Corporation, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me in that office according to the best of my abilities and agreeably to the rules of law and the charter, by-laws, and votes of said corporation, so help me God.

CHARLES J. FOX.

HILLSBOROUGH, ss.

JULY 7, 1835.

Then the aforesaid Charles J. Fox personally appeared, and took and subscribed the foregoing oath of office.

Before me,

DANIEL ABBOT,
Justice of the Peace.

Which said oath of office having been duly administered by Daniel Abbot, Esq., a justice of the peace for said county of Hillsborough, to the said Charles J. Fox, he was declared duly elected and qualified to act as clerk of said corporation, and he proceeded to act accordingly. In testimony of all

which, we, the said associates, have hereunto respectively signed our names.

IRA GAY.
DAN'L ABBOT.
BENJ. F. FRENCH.
PETER CLARK.
CHARLES J. FOX.

And I, the aforenamed Jesse Bowers, have hereunto set my hand in approval thereof.

JESSE BOWERS.

Thereupon, it was voted that the clerk record the act of incorporation in the record book of said corporation, and certify the same on the record.

STATE OF NEW HAMPSHIRE.

IN THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED AND THIRTY-FIVE.

AN ACT TO INCORPORATE THE NASHUA & LOWELL RAILROAD CORPORATION.

Be it enacted, etc.

SECTION 1. That Jesse Bowers, Ira Gay, Daniel Abbott Benjamin F. French, John M. Hunt, Peter Clark and Charles J. Fox, their associates, successors and assigns, be and hereby are constituted and made a corporation by the name of the Nashua & Lowell Railroad Corporation; and by that name may sue and be sued, prosecute and defend to final judgment and execution, and may have and use a common seal, and the same may alter and renew at pleasure; and may also make, ordain, and put in execution all

such by-laws and regulations (not being contrary to the constitution and laws of this State) as shall be necessary, proper and convenient for the government of said corporation, the due management of its concerns, and the preservation and proper use of said railroad; and shall be and hereby are vested with all the powers and privileges, and subject to all the liabilities, which by law are incident to corporations of a similar nature.

SECT. 2. That said corporation be and hereby is empowered to locate, construct and keep in repair a railroad from any point in the southern line of the State, to some convenient place in or near Nashua village, in Dunstable, in such manner as they shall deem most expedient, and to take toll for all passengers and property of all descriptions conveyed upon the same or any part thereof; and for this purpose may lay out said railroad not exceeding six rods wide, and may take as much more land as may be necessary for stone and gravel, for embankments, cuttings, walls, bridges and abutments for the proper construction of said railroad: *Provided*, that all damages occasioned by taking the same shall be determined in the manner hereinafter provided; and that the transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads, and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations and provisions as the directors shall from time to time prescribe and direct.

SECT. 3. That said corporation be and is hereby authorized, for the purposes aforesaid, to purchase, take, hold, improve, and convey real and personal estate of every kind, and to erect thereon such depots, storehouses, toll-houses and other buildings as they may think expedient, to such

amount as they may find sufficient for the completion of said railroad and the management of its concerns: *provided*, said amount shall not exceed three hundred thousand dollars.

SECT. 4. That the said Jesse Bowers, Daniel Abbott and Ira Gay, or any two of them, may call the first meeting of said corporation, by giving to each of the members seven days' previous notice, at which meeting a clerk shall be chosen, who shall be sworn to the faithful discharge of the duties of his office, and it shall be his duty to record the doings and proceedings of said corporation, and to perform such other services as the by-laws of said corporation may require. And at the same or any subsequent meeting duly holden, the members of said corporation may prescribe the time and manner of calling, holding and managing future meetings; may divide the capital stock, or such portions thereof as they may deem sufficient for the time being, into shares, and prescribe the mode in which the same shall be holden and transferred; may make or provide for the making of assessments on said shares, from time to time as occasion may require, provided that assessments shall not exceed in the whole the sum of twenty-five dollars on each share, and fix the time and mode of payment; may appoint and constitute such officers, servants or agents of the said corporation as they shall think expedient, and prescribe their respective duties and powers; and may do or transact any other matter or thing relating to the property, business or concerns of said corporation. And each member shall be entitled to one vote for each share he owns or holds in said corporation, and absent members may be represented and vote by proxy, authorized thereto by writing filed with the clerk of said corporation; and all questions shall be decided by a majority of votes cast: *provided*, that no vote

shall be given by any proprietor for any share owned or held by him exceeding one tenth of the whole number of shares.

SECT. 5. That the shares aforesaid shall be liable and holden for the payment of all assessments legally made thereon; and in case of the neglect or refusal of any member to pay the assessments on his share or shares, the same or so many of them as may be sufficient to pay the amount of such assessments, with interest and expenses of sale, may be sold and transferred for the payment of the same, in such manner as may be prescribed by the by-laws of said corporation: *provided*, that if it be necessary to raise a sum exceeding twenty-five dollars on each share, the same shall be done by creating new shares.

SECT. 6. That when the lands or other property of any feme covert, infant, spendthrift, or person *non compos mentis*, shall be necessary for the construction of said railroad, the husband of such feme covert, or the guardian of such infant, spendthrift, or person *non compos mentis*, may release all damages for any land or property taken and appropriated as aforesaid, as fully as they might do if the same were holden in their own rights respectively.

SECT 7. That said corporation shall be holden to pay all damages, arising to any person or corporation by taking their land for said railroad, when it cannot be obtained by voluntary agreement, on petition to the Court of Common Pleas, in the mode provided by law for the recovery of damages, occasioned by the laying out of highways by order of said court.

SECT. 8. That said corporation be and hereby is authorized to cross any canal, or to cross, raise, lower or run along any turnpike, highway, or other way: provided that said railroad shall be so constructed as not to obstruct the

safe and convenient use of the same; and if said railroad shall not be so constructed, the proprietors of such canal or turnpike, the owner of such private way, or the selectmen of the town in which such highway may be situated, as the case may be, shall be entitled to an action on the case against said corporation, and may recover reasonable damages: *provided, however*, that the proprietors, owners, or selectmen, aforesaid, as the case may be, shall, before action brought, file with the clerk of said corporation a particular description in writing signed by them, of all such alterations as they may deem necessary, and shall specify therein, and allow a reasonable time to said corporation for making said alterations; and *provided further*, that no action shall be sustained as aforesaid, unless brought within one year after the time allowed for making such alterations shall have expired.

Sect. 9. That said corporation shall substantially construct and keep in good repair all bridges, abutments, foundations, walls and embankments which may be necessary for safely and conveniently crossing any canal, or crossing, passing over, under or along any turnpike, highway or other way; and when any public highway shall hereafter be laid out by the selectmen of any town, or by order of the Court of Common Pleas, across said railroad, said corporation, being thereto required in writing by the selectmen of the town where such highway may cross said railroad, shall make such alterations in said railroad as may be necessary to the proper construction of said highway, and the convenient and safe use thereof, and the same constantly maintain and keep in repair; and in default thereof shall be liable in damages to the party injured, and also to prosecution by indictment and fine, to the use of the county wherein such

default may take place, at the discretion of the court before whom the same may be tried.

SECT. 10. That no other railroad shall be granted, within thirty years from the completion of the railroad granted in this act, running parallel with, or which is a substitute for the same, or any part thereof, within five miles of the same: *provided, however*, that any railroad may be granted running to meet the railroad granted in this act at its termination, anything herein contained to the contrary notwithstanding; and *provided further*, that if the location of said railroad be not filed with the Secretary of State on or before the first day of July, in the year of our Lord one thousand eight hundred and thirty-six, or if said railroad shall not be commenced, and the sum of four thousand dollars have been laid out and expended on the same, within three years from and after the passage of this Act, or if the same shall not be completed so that passengers and property may and shall be conveyed on the same within five years from this time, then this act shall be null and void.

SECT. 11. That if any person shall wilfully, maliciously or wantonly, and contrary to law, obstruct the passage of any engine or carriage upon said railroad, or in any way injure or destroy said railroad or any part thereof, he, she or they, or any person aiding or abetting in such trespass, shall forfeit and pay to said corporation for every such offence, treble such damages as shall be proved, to be sued for and recovered before any court proper to try the same. And such offender shall be liable to indictment, by the grand inquest for the county in which such trespass shall have been committed, for any offence aforesaid; and on conviction thereof shall pay a fine not exceeding five hundred dollars, nor less than thirty dollars, for the use of said county, or

may be imprisoned for a term not exceeding one year, at the discretion of the court before whom such conviction may be had.

SECT. 12. That said corporation be and hereby is authorized to extend said railroad, from its termination at the southern line of this State into and through the Commonwealth of Massachusetts, to meet the Boston & Lowell Railroad, whenever said Commonwealth will empower said corporation so to do, with such powers, liabilities and restrictions as may be deemed expedient; and for this purpose said corporation may increase their capital stock and create new shares, as said commonwealth may authorize them to do.

SECT 13. That the Legislature may authorize any company to enter with another railroad at the termination of said Nashua & Lowell Railroad, at Nashua village, in said Dunstable, or between the factories of the Jackson Company in said Dunstable and Merrimac River, paying for the right of using the same or any part thereof such a rate of toll as the Legislature may from time to time prescribe, and complying with such rules and regulations as may be established by said Nashua & Lowell Railroad Corporation; and that it shall be the duty of the directors of said company, from year to year, on or before the second Wednesday of June, verified by the affidavit of at least two of them, to make a report to the Legislature of their acts and doings, receipts and expenditures, under the provisions of this act, and their books shall at all times be open to the inspection of any committee of the Legislature appointed for that purpose. And if said corporation shall unreasonably neglect or refuse to make such report, at the expiration of every year after he opening of said railroad, for every such neglect or

refusal, they shall forfeit and pay to the use of the State a sum not exceeding five thousand dollars, to be recovered by actionor indictment in any court of competent jurisdiction.

SECT. 14. That if, after the expiration of five years from and after the completion of said road, the net income or receipt from tolls and other profits, taking the five years aforesaid as the basis of calculation, shall have amounted to more than ten per cent per annum upon the cost of the road, the repairs and all expenses incident thereto, the Legislature may take measures to alter and reduce the rate of tolls and other profits in such a manner as to take off the overplus for the next five years, calculating the amount of transportation upon the road to be the same as the five preceding years; and at the expiration of every five years thereafter, the same proceedings may be had: *provided*, that it shall be in the power of the State, at any time during the continuance of the charter hereby granted, after the expiration of twenty years from opening, for use of the railroad herein provided to be made, to purchase of the said corporation the said railroad, and all the franchise, property, rights and privileges of said corporation, by paying to said corporation a sum equal in amount to their capital expended, with such further sum, after deducting the net income by them received, as shall make their net income equal to ten per cent on said capital annually.

SECT. 15. That nothing in this act contained shall prevent the Legislature from granting any charter, for a company to construct a railroad commencing at the southerly line of the State, in either of the towns of Hudson, Pelham or Salem, to thence run northwardly to Concord; provided such railroad shall be laid out and constructed on the east

side of Merrimac River, as far northwardly as Amoskeag village, in Goffstown.

SECT. 16. That nothing in this act shall be so construed as to affect the rights of any railroad corporation heretofore granted, and that the Legislature of this State may at any time hereafter alter, amend or modify this act, or any of its provisions.

Approved, June 23, 1835.

C. G. ATHERTON,
Speaker of House of Representatives.

CHARLES F. GOVE,
President of the Senate.

Approved June 23, 1835.

WILLIAM BADGER,
Governor.

SECRETARY OF STATE'S OFFICE, June 26, 1835.

I hereby certify the foregoing to be a true copy of the original act now on file in this office.

RALPH METCALF,
Secretary of State.

A truee opy,
Attest: CHARLES J. FOX, *Clerk.*

Voted, That the warrant of notice issued by Jesse Bowers, Ira Gay and Daniel Abbot, to call this meeting, be recorded, and also that the original be duly filed with the clerk.

To Benjamin F. French, John M. Hunt and Charles J. Fox, all of Dunstable, and Peter Clark, of Francistown, all in the county of Hillsborough, and State of New Hampshire.

By virtue of an Act of the Legislature of said State, made and passed the twenty-third day of June, A. D. 1835, entitled "An Act to incorporate the Nashua & Lowell Railroad Corporation," among other things authorizing the subscribers, or any two of them, to call the first meeting of said corporation by giving to each of the members seven days' previous notice.

You are hereby notified that the first meeting of said corporation will be held at the office of Abbot & Fox, in said Dunstable, on Tuesday, the seventh day of July, A. D. 1835, at 3 o'clock P. M.

First. To choose a moderator to govern said meeting.

Second. To choose a clerk of said corporation, to be sworn, agreeably to law, to the performance of his duties.

Third. To choose such committees or agents as may be thought necessary, and to prescribe their duties.

Fourth. To agree upon the mode of calling future meetings, and to do and transact such other business as may be thought proper coming within the provisions of said act.

Dated at Dunstable, this twenty-ninth day of June, A. D. 1835.

JESSE BOWERS.
IRA GAY.
DANIEL ABBOT.

Authorized by said act to call the first meeting of said Corporation.

DUNSTABLE, July 7, 1835.

We, the undersigned, severally acknowledge that we have received due notice of the within-named meeting of the pro-

prietors of said corporation, and that we have met at the time and place within mentioned accordingly.

BENJAMIN F. FRENCH.
JOHN M. HUNT.
PETER CLARK.
CHARLES J. COX.

A true copy of said warrant and acknowledgment.

CHARLES J. FOX,
Clerk.

Voted, That Daniel Abbot, Esq., be empowered to act as an agent to procure an engineer to make a survey of the route for the contemplated railroad, and that he report his doings as soon as may be and to make all other necessary arrangements for said survey.

Voted, That this meeting be and stand adjourned, to meet at the same place, to-morrow, at 2 o'clock P. M.

A true record of the proceedings of said corporation.

CHARLES J. FOX,
Clerk.

At a meeting of the stockholders of the Nashua & Lowell Railroad Corporation, holden at the Washington House, in Nashua village, on Monday, May 30, A. D. 1836, the following gentlemen were duly elected directors of said corporation: —

DANIEL ABBOT.
IRA GAY.
JESSE BOWERS.
CHARLES G. ATHERTON.
PETER CLARK.
JOSEPH GREELEY.
ROBERT READ.

Attest: JOHN L. CLARK, *Clerk of said Corporation.*

A Record of the Proceedings of the Directors of the Nashua & Lowell Railroad Corporation.

At a meeting of the directors of said corporation, holden at the office of Abbot & Fox, in Dunstable, on Monday, May 30, A. D. 1836, at 7.30 o'clock, P. M.

Present: Daniel Abbot, Ira Gay, Jesse Bowers, Charles G. Atherton, Peter Clark, Joseph Greeley and Robert Read.

Ira Gay was chosen chairman.

On motion of Mr. Abbot,

Voted, To proceed to the choice of a directors' clerk, and John L. Clark was duly elected.

The said Clark then appeared, and manifested his acceptance of the office and took the following oath: —

I, John L. Clark, being duly elected clerk of the directors of the Nashua & Lowell Railroad Corporation, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me in my said capacity, according to the best of my ability and agreeably to the rules of law and the charter, by-laws and legal votes of said corporation, so help me God.

John L. Clark.

Hillsborough, ss. May 30, 1836.

Then the said John L. Clark personally appeared and took the foregoing oath by him subscribed.

Before me,

C. G. Atherton,
Justice of the Peace.

On motion, proceeded to the choice of a president, and Hon. Daniel Abbot was duly elected.

Voted, That a committee of two be chosen to make inquiry for a suitable room in which to hold future meetings of the directory; that said committee ascertain the terms of Col. Baldwin, the engineer. Peter Clark and Joseph Greeley were chosen on said committee.

Voted, That three hundred copies of the charter and by-laws of said corporation be printed for the use of the same, and that the clerk procure the same.

Voted, To choose a committee to wait upon the engineer and attend him in the surveys for the location of the Nashua & Lowell Railroad. Messrs. Gay and Greeley were appointed on said committee.

Voted, That the meeting stand adjourned, to meet to-morrow evening, at half past seven o'clock, at the same place.

A true record.

Attest: JOHN L. CLARK, *Clerk*.

OFFICE OF ABBOT & FOX, TUESDAY EVENING, MAY 31, A. D. 1836.

Met pursuant to adjournment. Present: D. Abbot, Ira Gay, P. Clark, J. Greeley and R. Reed.

Voted, That the meeting stand adjourned, to meet on Friday next, at 4 o'clock P. M., at this place.

A true record:

Attest: JOHN L. CLARK, *Clerk*.

OFFICE OF ABBOT & FOX, FRIDAY, 4 O'CLOCK P. M., JUNE 3, A. D. 1836.

Met pursuant to adjournment. Present: Daniel Abbott, Jesse Bowers, Peter Clark, Joseph Greeley and Robert Reed.

Voted, That Charles J. Fox be a committee to prepare an act embracing generally the provisions contained in the Revised Statutes of Massachusetts, empowering county commissioners on roads to settle the damages in relation to railroad corporations, taking the lands of individuals; and that said committee take all proper measures that may be necessary to procure the passage of said act at as early a day, the present session of the General Court, as practicable; and, if that cannot be done, to procure an alteration in the present law, allowing railroad corporations to petition for com. to settle damages.

Voted, That Charles J. Fox be a committee to procure printed, for the use of the corporation, one hundred copies of blank bonds for the conveyance of lands to the corporation.

Voted, That Daniel Abbot be a committee to procure a common seal for the corporation, with such device as he may think proper.

Voted, That Ira Gay, Joseph Greeley and Peter Clark be a committee to attend upon the engineer in his further surveys.

Voted, To adjourn *sine die*.

A true record.

Attest: JOHN L. CLARK, *Clerk*.

At a meeting of directors, March 6, 1838, present: Abbot, Clark, Holbrook, Greeley and Bowers, *under an Act of the Legislature of the State of New Hampshire*, passed June 23, 1835, held at Nashua, March 6, 1838, it was

Voted, That Daniel Abbot and Henry Upham be a committee, in behalf of *said corporation*, to urge the passage of a law by the Legislature of the Commonwealth of Massachusetts, at their present session, authorizing said corporation

to unite with a corporation of the same name established by an Act of the Legislature of Massachusetts, passed April 16, 1836. And said committee are instructed to appear before any committee of said Legislature, and request the passage of an act for the purpose aforesaid.

Adjourned *sine die*.

A true record.

Attest: P. CLARK, Jr., *Clerk*.

ACTS OF MASSACHUSETTS AND NEW HAMPSHIRE LEGISLATURES RELATING TO THE NASHUA & LOWELL RAILROAD CORPORATION, PASSED IN 1836 AND IN 1838.

CHAPTER 249, MASSACHUSETTS LAWS, 1836.

AN ACT TO ESTABLISH THE NASHUA & LOWELL RAILROAD CORPORATION.

Be it enacted, etc.:

SECTION 1. That Jesse Bowers, Ira Gay and Daniel Abbot, their associates and successors, are hereby made a corporation by the name of the Nashua & Lowell Railroad Corporation, with all the powers and privileges, and subject to all the duties, liabilities and provisions contained in that part of the thirty-ninth chapter of the Revised Statutes, passed November the fourth, in the year one thousand eight hundred and thirty-five, which relates to railroad corporations, and in the forty-fourth chapter of said Revised Statutes; and said corporation is hereby authorized and empowered to locate, construct and finally complete a railroad from Lowell, in the county of Middles x, to form a junction with portion of said Nashua & Lowell Railroad, lying within the State of New Hampshire; the proposed railroad commencing and pursuing

the course following, viz.: commencing at the western termination of the straight line near the car house of the Boston & Lowell Railroad; thence passing along the northern bank of the canal, about eighteen hundred feet, to a point a little westerly of the bridge over the same; thence westerly, curving a little to the north, about one hundred and seventy rods, to a point in said canal, about forty rods south of the guard locks; thence crossing said canal, and running westerly in the same direction, curving slightly to the south, about two hundred and fifty-six rods, to a point about ten rods south of Black Brook, crossing the highway about forty rods east of Whitney's house; thence westerly, crossing Black Brook, and continuing a straight line about one hundred and twenty rods, to the second lock of the locks at the head of Middlesex Canal; thence crossing said lock, and passing along near the south bank of Merrimac River, about one mile, to the margin of the Merrimac, at the hill, about ninety-five rods east of Stony Brook; thence curving gradually to the north, to a point near the mouth of said brook; thence crossing said brook, and curving gradually to the south, about three hundred and sixty-six rods, to the Middlesex turnpike gate; thence passing near the eastern side of said turnpike, about two miles, to a point near the head of said turnpike; thence curving to the south, on the southern bank of the Merrimac, to the mouth of Biscuit Brook: thence curving northerly, and passing up the westerly bank of the Merrimac to the mouth of Butterfield's Brook; thence passing said brook, and leaving said bank, and curving gradually to the west, round the brow of the ridge, across the Horseshoe Bend, about one mile and one hundred rods, to the mouth of Howard's Brook; thence crossing the same near its mouth, and running along the bank of the Merrimac,

to the northern line of the State, so as to unite with that part of the Nashua & Lowell Railroad lying within the State of New Hampshire; or the said corporation may commence their road at some convenient point near the Boston & Lowell Railroad, south of the Patucket Canal, and run near the margin of said canal, till they meet the line before described.

SECT. 2. The capital stock of said corporation shall consist of a sum not exceeding three hundred thousand dollars, to be divided into shares of one hundred dollars each; and said corporation may purchase and hold such real estate as may be necessary for a depot and other purposes connected with the use of said road.

SECT. 3. Said corporation are hereby authorized to enter with their railroad on that point of the Boston & Lowell Railroad designated in the first section of this act, or within thirty rods in either direction from said point, paying for the right to use the same, or any part thereof, such a rate of toll as the Legislature may from time to time prescribe, and complying with such rules and regulations as may be established by said Boston & Lowell Railroad Corporation, by virtue of the fifth section of their act of corporation; provided, however, that it shall be the duty of the corporation hereby created to enter the said Boston & Lowell Railroad by such turnouts or switches as will not unreasonably incommode the travel upon the said Boston & Lowell Railroad, and pay all the expenses incident to and in consequence of any alterations necessary in said Boston & Lowell Railroad, to enable them to enter upon it in a proper manner.

SECT. 4. If the amount of stock of said railroad shall not have been subscribed for, the corporation organized

and the location of the road filed with the county commissioners of the county of Middlesex previous to the first day of January in the year one thousand eight hundred and thirty-seven; or if said corporation shall fail to complete said road on or before the first day of September in the year one thousand eight hundred and thirty-eight, this act shall be void.

SECT. 5. Nothing contained in this act shall authorize said corporation to erect any pier or other obstruction in the Patucket or Middlesex Canal, and if they construct their railroad across either of said canals they shall not in any way obstruct the safe and convenient use of said canals.

SECT. 6. The Legislature may, after the expiration of four years from the time when this railroad shall be open for use, from time to time, alter or reduce the rate of tolls and other profits upon said road, but the said tolls shall not, without the consent of said corporation, be so reduced as to produce with said profits less than ten [per cent per annum.

Approved April 16, 1836.

CHAPTER 21, NEW HAMPSHIRE LAWS, 1838.

AN ACT TO UNITE THE NASHUA AND LOWELL RAILROAD CORPORATIONS OF MASSACHUSETTS AND NEW HAMPSHIRE, AND FOR OTHER PURPOSES.

Be it enacted, etc.:

SECTION 1. That the two corporations under the name of the "Nashua & Lowell Railroad Corporation," one of which charters was granted by the Legislature of this State,

the twenty-third day of June, one thousand eight hundred and thirty-five, and the other by the Legislature of the Commonwealth of Massachusetts, the sixteenth day of April, one thousand eight hundred and thirty-six, are hereby authorized, from and after the time when this act shall take effect, to unite said corporations; and all the tolls, franchises, rights, powers, privileges and property of the said two corporations shall be held and enjoyed by the stockholders in each and both, in proportion to their number of shares therein. And from and after the time said corporations shall be united, all property owned, acquired or enjoyed by either of said corporations shall be taken and accounted to be the joint property of the stockholders, for the time being, of said two corporations.

SECT. 2. That from and after the time said corporations shall be united, all the stockholders shall be entitled to the same notice, and shall enjoy the same right of voting. And all meetings shall be warned and held by the associated stockholders pursuant to the by-laws of said corporations, and such meetings shall be legal to choose all officers of said corporation and to transact any other business which other railroad corporations might of right do: *provided always*, that there shall be at least one officer in each State, who is an inhabitant thereof, on whom process against said corporation may be served, and that the books and registry of one corporation shall be taken to be the books and registry of the other corporation.

SECT. 3. That the share or shares of any stockholder in said company shall be liable to attachment and execution, in the State where such stockholder, at the time of such attachment or execution, shall reside, or inhabit: *provided always*, that a true and attested copy of such attachment or

execution shall be left, at the time of service, by the officer serving the same, with the clerk, or any director of said corporation, or at his usual place of abode, in the State where such attachment or execution shall be served.

SECT. 4. That the said corporation shall keep separate accounts of the expenses which have arisen, or shall arise, in construction of the portions of said railroad situated in the States of Massachusetts and New Hampshire respectively, and of all the expenses which would have properly belonged to the respective corporations, as if this act had not been passed, until the same shall be completed in both States. And there shall be two commissioners appointed, who shall hold their offices for the term of four years, whose duty it shall be to ascertain what proportion of the expenditures on said raidroad and of the other expenses attending its construction and maintenance, also what proportion of the receipts and profits of said railroad shall properly appertain and belong to the portions of said railroad situated in said two States. And the annual report, which shall be made to the Legislature of this State, in pursuance of the laws of this State relating thereto, shall be approved by said commissioners. And the governor of each of said States shall appoint one commissioner, who shall execute the duties prescribed by this act, and who shall receive from said corporation a reasonable compensation for their services.

SECT. 5. That whereas the Legislature of the Commonwealth of Massachusetts have passed a subsisting act, substantially similar, uniting said two corporations, this act shall be in force when the same shall have been accepted by the stockholders of each and both said corporations, at a meeting to be called for that purpose; at which meeting said

stockholders may vote to ratify and render valid, in the united corporations, all former proceedings which would have been valid in said corporations respectively; and the same shall be as binding on the united corporations as if adopted separately by each.

SECT. 6. That the said corporation, so far as their road is situated in this State, when united by virtue of the provisions of this act, shall be subject to the general laws of this State, to the same extent as said corporation would have been if this act had not been passed.

SECT. 7. That after said corporations shall be united, according to the provisions of this act, they shall be one corporation, by the name of the Nashua & Lowell Railroad Corporation; and all the acts of said corporations which are valid in said corporations severally shall be valid in the united corporation.

SECT. 8. That said corporation shall have power, and they are hereby authorized, to alter and amend the location of their road, so far as the same lies north of Nashua River, subject to all the liabilities contained in their original charter; provided, such location be made and such amended alteration filed in the office of the Secretary of State on or before the first day of September next. And so much of the tenth section of an act entitled "An Act to incorporate the Nashua & Lowell Railroad Corporation" as requires the filing of the location of their road with the Secretary of State on or before the first day of July, A. D. 1836, shall be and is hereby repealed, so far as relates to that portion of said road lying north of Nashua River, as before mentioned.

SECT. 9. That the Legislature of this State may at any time hereafter so alter, amend or modify this act, or any of its provisions, as the public good may require.

Approved June 26, 1838.

CHAPTER 96, MASSACHUSETTS LAWS, 1838.

AN ACT TO UNITE THE NASHUA & LOWELL RAILROAD CORPORATIONS OF MASSACHUSETTS AND NEW HAMPSHIRE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the Legislature of the State of New Hampshire in the year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the Legislature of this Commonwealth in the year one thousand eight hundred and thirty-six; and the said two corporations are hereby united into one corporation by the name of the Nashua & Lowell Railroad Corporation; and all the tolls, franchises, rights, powers, privileges and property granted or to be granted, acquired or to be acquired, under the authority of the said States, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said corporations.

SECT. 2. The said stockholders shall hold their meetings, make their by-laws, appoint their officers and transact all their business as one corporation; *provided*, that one or more of the officers of said corporation shall be a resident in this Commonwealth, and one or more of them in the State of New Hampshire, on whom process against said corporation may be legally served, in either State, and that said corporation shall be held to answer in the jurisdiction where the service shall be made and the process is returnable.

SECT. 3. The share or shares of any stockholder in said corporation shall be liable to attachment and to be taken on execution in the State where such stockholder shall reside

at the time of the service of the process; *provided*, that an attested copy of the writ of execution and of the officer's return shall, at the time of the service, be left with the clerk or a director of the corporation, or at his usual place of abode, by the officer making the service.

SECT. 4. The said corporation shall so make out and keep an account of the expenditures on said road from its commencement to its completion as clearly to exhibit what portion thereof belongs to that part of said road situated in Massachusetts, and what portion to that part in New Hampshire.

And two commissioners shall be appointed, one by the governor of each State, to hold their offices for the term of four years, and to be reasonably compensated for their services by said corporation, who shall ascertain what proportion of expenditures on said road, and of the other expenses attending its construction, maintenance and use, also what proportion of the receipts and profits of said railroad shall properly appertain and belong to the portions of said road in each State respectively. And the annual report required to be made by the directors to the Legislature of this Commonwealth shall be approved by the said commissioners.

SECT. 5. The said corporation, so far as their road is situated in Massachusetts, shall be subject to the general laws of the State to the same extent as the Nashua & Lowell Railroad Corporation, established by its Legislature in the year one thousand eight hundred and thirty-six, would be if this act had not been passed.

SECT. 6. This act shall not take effect until the Legislature of the State of New Hampshire shall have passed an act similar to this, uniting the said stockholders into one corporation, nor until said acts have been accepted by the

said stockholders at a meeting duly called for that purpose, at which meeting the said stockholders may ratify and confirm all or any of their former doings, and adopt them as the acts and proceedings of the said united corporation.

Approved by the Governor, April 10, 1838.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1386.

NASHUA & LOWELL RAILROAD CORPORATION

v.

BOSTON & LOWELL RAILROAD CORPORATION ET AL.

EXTRACT FROM TRANSCRIPT OF RECORD.

On the fourteenth day of June, 1880, a plea was filed to the bill, and on the nineteenth day of July, A. D. 1880, the following plea was filed as a substitute therefor by consent: —

PLEA.

[Filed July 19, 1880.]

The joint and several plea of the Boston & Lowell Railroad Corporation, Hocum Horsford *and* Charles E. A. Bartlett, *defendants to the amended bill of complaint of the* Nashua & Lowell Railroad Corporation, Jeremiah W. White, Cornelius V. Dearborn *and* Erastus B. Hammond.

These defendants, by protestation, not confessing or acknowledging the matters and things in and by said amended bill set forth and alleged to be true in such manner and form as the

same are thereby and therein set forth and alleged, for plea to the whole of said amended bill, say that this Court ought not to take further cognizance of or sustain the said bill of complaint, because they say that they, the said defendants, at the time of filing said bill, were and still are all, each and every one citizens of the State of Massachusetts, and that said plaintiffs, at the time of filing said bill, were not and still are not all, each and every one citizens of another State, but that the said Nashua & Lowell Railroad Corporation, one of said plaintiffs, at the time of filing said bill, was and still is a corporation duly established and existing under and by virtue of the laws of Massachusetts, and a citizen of said State of Massachusetts, and at the time of filing said bill was not and still is not a corporation established and existing by the laws of the State of New Hampshire, and a citizen of said State of New Hampshire; all of which matters and things these defendants do aver to be true and are ready to verify. Wherefore they plead the same to the whole of said amended bill, and pray the judgment of this Honorable Court whether they should be compelled to make any other or further answer to said bill. And the said defendants further pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

THE BOSTON & LOWELL
RAILROAD CORPORATION,

By J. G. ABBOTT, *its President.*

HOCUM HORSFORD,

By S. A. B. ABBOTT, *his Attorney.*

C. E. A. BARTLETT.

This cause was thence continued to the October term, A. D. 1880, when the same was set down for hearing on the foregoing plea to the jurisdiction, and was fully heard before the

Hon. John Lowell, circuit judge, and the Hon. Thomas Nelson, district judge.

This cause was thence continued, under advisement, to the May term, A. D. 1881, when, on the twenty-seventh day of August, counsel for the respective parties being present, the Hon. Thomas L. Nelson, district judge, rendered the decision of the Court over ruling the said plea.

This cause was thence continued to the October term, A. D. 1881, when, on the fifteenth day of October, the following motion was filed:—

MOTION THAT DEFENDANTS BE ORDERED TO ANSWER OVER.

[Filed Oct. 15, 1881.]

And now, at the October term of said court, the plaintiff in the above suit comes and moves this Honorable Court, after defendant's plea to the jurisdiction has been overruled by this Court (Aug. 27 last), that the defendants be ordered to answer the complainant's bill.

By its Solicitor,

F. A. BROOKS.

On the nineteenth day of November, A. D. 1881, the foregoing motion was granted and defendants were ordered to answer by Jan. 1, A. D. 1882.

United States of America,
Massachusetts District, ss.

I, John G. Stetson, clerk of the Circuit Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy (extract) from the transcript of record transmitted to the Supreme Court of the United

States upon appeal in the cause in equity, determined in said Circuit Court, entitled No. 1,386,

Nashua & Lowell Railroad Corporation *v.* Boston & Lowell Railroad Corporation *et al.*,

as will appear by a comparison of the foregoing copy with said transcript.

In testimony whereof I hereunto set my hand and affix the seal of said court in Boston, in said district, March 28, 1890.

[SEAL] JOHN G. STETSON,
Clerk.

N. B. — Mr. BARTLETT, the treasurer of defendant corporation, was originally one of the defendants to plaintiff's bill, and charged therein with a direct personal liability to the plaintiff; but the bill has been long since dismissed as to him, and the four lines at bottom of page 3, and the five lines at top of page 4 of the record, do not now make any part of the case relied on by the plaintiff, or deemed correct in fact by it, and should therefore be disregarded.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 166.

THE NASHUA & LOWELL RAILROAD CORPORATION,
Appellant,

v.

THE BOSTON & LOWELL RAILROAD CORPORATION
ET ALS.

BRIEF FOR APPELLANT.

FACTS.

The plaintiff and defendant corporations were respectively the owners of two short railroads making parts of a continuous line of track leading from the city of Boston, Mass., into the State of New Hampshire, and beyond, and connecting with each other at Lowell, Mass., twenty-six miles from Boston.

In 1857 these two corporations entered into a contract with each other for operating together, or pooling the receipts of their two roads, and dividing the net earnings between them in the agreed ratio of thirty-one per cent to plaintiff and sixty-nine per cent to defendant corporation.

The plaintiff was a New Hampshire corporation at first, and was subsequently chartered in Massachusetts, and the two corporations were then united by the Legislative sanc-

tion of both States. The defendant corporation was wholly a Massachusetts corporation.

Under New Hampshire laws as then existing, and as they existed at the time of the commencement of this suit, it was not legally competent for these two corporations to enter into or carry out such a pooling contract.

Bailey's 2d Dep., Rec. p. 179; 105, -6, -7 Ans.
Burke *v.* Concord R. R., 61 N. H. 160.

The law of Massachusetts was then probably the same in this respect.

The two corporations undertook to get around this legal difficulty by taking their respective railroads and the management thereof temporarily out of the hands of the Directors respectively, in each case, and placing the same and the revenues thereof in the possession of a third person, called a Manager, and by agreeing upon the selection of the same third person as the Manager of both roads, intending thereby that this Manager should be able as the common agent of both parties to do whatever was desirable in the case of either of the two properties, and should be restrained from doing things not acceptable to a majority of the Directors of both companies while acting together or in concurrence in supervision of the special agent thus installed in the place of two separate Boards or bodies of Directors.

The plan, in brief, was a delegation of the powers of the Directors of each corporation separately to the same single third person, reserving only such control over the common agent as the two Boards of Directors when acting together or in concert with each other might see fit to exercise.

Contract, Arts. 1 and 5. Rec. pp. 10 + 11.

The powers and functions of the Manager were fixed and defined in the code of rules in these words: "The chief

executive officer of the joint roads shall be entitled the Manager." . . . "It is his duty to act as the agent of the Directors, and as the responsible head of the joint companies, to direct and control their affairs in every department." . . . "He shall have power to employ for the service of the companies all necessary agents or servants."

The possession of both roads and the receipts thereof were to be put, and in fact were put, into the hands of this common Manager, by whom the expenses were to be first paid, and the net earnings were then to be divided, and paid over to the respective treasurers of plaintiff and defendant corporations, the plaintiff treasurer receiving thirty-one per cent and the defendant treasurer receiving sixty-nine per cent of the joint net income.

Contract, Art. 14, Rec. p. 13.

The two corporations agreed upon a certain code of rules for conducting this special agency management by which the Manager was given the selection and appointment of subordinate officers or assistants, including a cashier for the reception and disbursements of the earnings, and a clerk whose duty it was among other things to make up and apportion the net earnings between the roads under the direction of the Manager, in accordance with the provisions of the joint contract.

Rules for Government of Executive Service, Rec. p. 69.

At the inception of the contract George Stark was chosen Manager. He continued to occupy that position till March 31, 1875, about eighteen years. He was succeeded by Hoscum Hosford in July, 1875, and Hosford remained Manager till Dec. 1, 1878, when the contract terminated and the special agency management came to an end.

It is recited in the preamble of the contract (Rec. p. 9.)

that "said corporations by operating said roads *in common management* would be enabled to do the said business" (passing over the roads of both parties) "with greater facility, greater regularity, and at a great saving of expense to both parties." By Art. 1 of the contract it is provided that each party shall surrender to the "joint management the entire control of their respective roads, shops, depots, furniture, machinery, tools, etc., reserving only to the *separate management* of each corporation such property" (consisting chiefly of real estate) "as is hereinafter specified."

Art. 5 provides that the joint roads shall be operated and managed by one agent . . . chosen by the concurrent vote of a majority of the Directors of each party . . . and "the respective Boards of Directors shall by such concurrent action exercise the same control over the management" (meaning the joint management) "as is usual with boards of railroad directors in ordinary cases."

It will be observed that by this arrangement the management of each road under the common agent was to be participated in equally by the Directors of both, so that neither road was to be controlled, as previously, by its own separate Board of Directors; in other words, the two separate Boards of Directors became superseded or supplanted by this special agent or joint Manager, except so far as they might agree together in exercising control over him.

By Art. 8 of the contract (Rec. p. 12), it was provided "that the roadbed, bridges, superstructure, depots, building and fixtures of each road" (after certain changes should have been made, as set forth in Arts. 6 and 7) "should be kept, as near as may be, in like relative repair from their present state and condition," etc.

By Art. 15, it was provided that the indenture should be construed as a business contract . . . and in no sense

as a lease of one road to the other, or as a union of corporate powers or privileges . . . excepting that . . . the rights and liabilities of one (party) with the other shall be settled and determined by this agreement.

Rec. p. 14.

In Art. 14, after fixing the ratio of division of the net earnings, and authorizing each party to make such dividends upon its own stocks, and payable from its own separate funds, as it may deem expedient, these words are added: "it being hereby distinctly provided that the interest upon the debts of either party must also be paid out of *such separate share* and not from *the common fund*."

After the adoption of this traffic contract, and as a means of enabling the two Boards of Directors to act together or in concurrence in exercising the joint supervision over the management contemplated in and by the fifth article of the contract, regular monthly meetings of both Boards of Directors were held at the same time and place in Boston. These monthly meetings were held in common, being attended by the members of both boards, and presided over by the same person who was also for many years at the same time the president and one of the Directors of both corporations. The matters considered and discussed at these joint meetings were such as arose under or related to the administration of the two roads under the traffic contract, and not the affairs and interests of either corporation separately.

Defts' Exhibit, No. 71, XXX., Rec. p. 356 bottom
Bailey's 1st Dep. Ans. 1 to 8, 2d do., 84th Ans. Rec. pp. 75 & 172
Stark's 2d Dep. Ans. 78 to 82, Rec. p. 132.

At these monthly meetings it was the custom of the Manager to make reports to the Directors, and to lay before them for approval any measures (not involving details only) upon which he desired their action or approval, and it was the

constant practice at these meetings to appoint committees consisting of the Manager and of members of both Boards of Directors, the Manager not being at the time a member of either Board of Directors. The Manager was often included as one member of a joint committee appointed by the two Boards of Directors. Three instances of this occurred at the meeting of Nov. 23, 1869.

Stark's 2d Dep. Ans. 173 and 175. Rec. p. 155.

At a joint meeting held March 1, 1870, a vote was passed fixing the salary of the president at $2,500 for both roads, payable from the joint funds.

At a joint meeting held Dec. 23, 1873, it was voted that the cashier of the joint roads be authorized and directed to open a deposit account with the National City Bank of Boston.

The Manager was frequently authorized to conclude and execute contracts in writing between the joint roads and other roads conducting business common to them all, and fixing the rates of division of receipts of such business.

At one of the joint meetings, held July 28, 1874, the Man ager was appointed as one of a committee to consider the best manner to bring about a union of the Boston & Lowell and Nashua & Lowell Railroad corporations according to the acts passed by the Legislatures of Massachusetts and New Hampshire.

Rec. p. 342.

Before the time limited for consolidation had expired, an attempt was made to get plaintiff committed by written contract to bearing thirty-one per cent of the interest of defendant's debts.

The common president, at meeting of April 23, 1875, called the attention of the board (*i. e.*, both boards) to certain agreements between the two roads as to leased lines and im-

provements which had not been formally reduced to writing, and stated that he held drafts of such contracts drawn by the attorney of the company which he had not been able to examine, and it was voted, that the same be referred to a committee, consisting of the president and Messrs. Stark and Horsford, of the Lowell (*i. e.*, Boston & Lowell) board, and that they be requested to report at the next meeting.

At the next joint meeting this committee made a report and the subject was postponed. This report came up at meeting of June 22, 1875, and was again postponed; it again came up at the meeting of July 27, 1875, when it was laid on the table on motion of one of plaintiff's Directors, and was never afterwards taken up or acted upon.

Rec. pp. 345.

Pursuant to the contract and the rules adopted for carrying the same into execution the roads and specific property of both corporations, as also the receipts, tolls and income of both roads, went into the hands of the Manager, to be by him divided, and paid over to the treasurers of the respective corporations as provided by the contract, and they were so divided and paid over by him agreeably to the contract for about fourteen years, and until the defendant corporation became involved in the expense of building a new and costly passenger station at Boston.

During that time the two corporations, in order to enlarge the terminal facilities at Boston, had made purchases together of real estate at Boston, and paid for the same from their separate funds, and had taken deeds thereof running to themselves as tenants in common, the plaintiff contributing thirty-one per cent of the purchase money, and the defendant sixty-nine per cent, and sharing the benefits of such purchases in the same proportions under the contract.

These purchases had been made and the deeds taken by

the two corporations in their separate capacity, and entirely outside of any action whatever on the part of the special agent or Manager, and the two roads in other respects had been maintained in substantially the same relative condition as at the inception of the contract, as provided by Art. 8 of said contract.

Stark's 2d Dep. 178th Ans., Rec. p. 156.

Early in 1869, or previously, the Boston & Lowell Company had formed the project of rebuilding and greatly enlarging its old passenger station at Boston, and of uniting with the Eastern Railroad Company in utilizing the new station, when built, for those two roads.

An act of legislation in Massachusetts was obtained for this purpose (May 19, 1869), by which the defendant corporation, either alone or with the Eastern Railroad, was authorized to take a large tract of land in Boston for a station.

At one of the regular monthly meetings of plaintiff and defendant Directors, held Sept. 28, 1869, the Manager submitted plans for the improvement of the terminal facilities of defendant company at Boston (meaning the proposed new station) under the act of the last Legislature authorizing the taking of land, and a committee was appointed with reference to the same.

Defts' Ex. 16, Rec. p. 304.

At the joint meeting of Directors, held Nov. 23, 1869, that committee reported, that after a protracted interview with a committee of the Eastern Railroad Directors, they had notified the Eastern Railroad Directors of the intention of the Lowell Railroad Company to proceed to locate under the act for itself alone, unless the Eastern should before that time have signified its intention to join them in the benefits of the act, and the committee recommended that the Lowell Rail-

road Company should proceed at once to locate upon the territory embraced in the act.

Their report was accepted, and the Boston & Lowell Board voted, that Messrs. Crowninshield and Abbott, both being Directors in defendant corporation, be a committee *with the Manager* to prepare a location and report the same for ratification at the next monthly meeting of the board.

Rec. p. 256

At the next annual meeting of the stockholders of defendant corporation (January, 1870) the Directors recommended that they (defendant's Directors) should be authorized to locate and purchase or take the land (for depot), under the act . . . and to construct suitable buildings and terminal facilities thereon, when satisfactory contracts relating thereto could be concluded with adjacent or connecting roads, meaning thereby either the Eastern Railroad or the so-called upper roads in New Hampshire and Vermont, and not referring at all to plaintiff's road. (This authority was in fact voted by the stockholders of defendant company, Jan. 5, 1870.)

Abbott's Dep. 39th Ans., Rec. p. 90

The defendant Directors failed to secure any satisfactory contract with the Eastern Railroad Company.

At the joint meeting of the two Boards of Directors held Jan. 24, 1871, the Manager submitted and read an estimate of cost of the proposed new station house in Boston, and presented plans of the same.

Cram's Dep. 8th Ans., Rec. p. 66

Prior to Dec. 15, 1871, the train house of the new station had been put under contract, and was well advanced in construction.

Abbott's Dep. 45th Ans., Rec. p. 92

At a meeting of the Directors of defendant corporation held Jan. 23, 1872, they voted that the Manager should proceed to the erection of the depot building in Boston substantially in accordance with the plans submitted.

Cram's Dep. 9th Ans., Rec. p. 67 Top

No such vote as this was passed by the plaintiff's Directors; they did, however, at a meeting held on the same day, appoint a committee of their own number to confer with a committee of the Directors of defendant corporation as to *what interest*, if any, the plaintiff corporation should take in the "new passenger depot in Boston, the Mystic River Railroad, and other property or extensions not embraced in contracts already made between the two corporations."

This committee never made any report, and, so far as appears of record, never took any action whatever on the subject committed to them.

It appears that the defendant corporation had, prior to Dec. 15, 1871, already invested in its Boston improvements $293,758.99, and that the defendant's Directors in their report to the stockholders (of that date) informed them that they had been able to "provide for the increased interest accounts upon investments in the *new works*," and further stated to the stockholders their confident expectation of being able (in future) "to keep up full dividends and meet the interest upon the expenditures now making and to be made for permanent improvements and increased facilities at the Boston terminus."

Abbott's Dep. 45 and 46th Ans., Rec. p. 92

So far as appears no further action was taken by either Board of Directors in relation to the station or the cost thereof, prior to the twenty-third day of July, 1872, when the usual monthly meeting of the two Boards of Directors with the Manager was held.

Interest on cost of defendant's new depot.

After the efforts of the Boston and Lowell Railroad Company to obtain the co-operation of the Eastern Railroad and its participation in the cost of the new station had failed, and the defendant corporation had already expended (prior to Dec. 15, 1871) in the enterprise nearly $300,000, Manager Stark originated the plan of paying over to the Boston & Lowell Corporation the joint net earnings in his possession as Manager, from time to time at intervals of six months, to an amount sufficient to keep down the interest on the cost of the same, or to refund to defendant corporation all interest charges incurred by it in such construction.

Stark's Dep. 128th Ans., Rec. p. 145
Abbott's Dep. 55th Ans., Rec. p. 97.

It appears that this plan was the subject of conversation or discussion between the members of the two Boards of Directors at their joint meetings and was assented or agreed to orally betweed them with entire unanimity.

This oral understanding or agreement, arrived at between the Directors individually, became the subject of formal action for the first time on the twenty-third day of July, 1872.

At that time on the occasion of one of the joint monthly meetings attended by both Boards of Directors and the Manager, they passed a vote in the words and figures following: —

Voted, That the expenditures made and to be made by the Boston & Lowell Railroad Corporation for land and building in Boston for a new station, and the expenditures made and to be made by said corporation for the building and completing the Mystic River Railroad, and for improvements in Winchester for a new station and land for railway purposes, to the amount of $20,000, are to be treated, in the management of the business under the joint business contract existing between said corporation and the Nashua & Lowell Railroad

Corporation as follows, viz.: The said Boston & Lowell Railroad Corporation are to be paid the interest upon such expenditures, made and to be made, at the rate of seven per cent per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract; and the cashier of said two corporations and treasurer of the Boston & Lowell Railroad Corporation is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston & Lowell Railroad Corporation out of the joint receipts of said two corporations.

Previously to the passage of this vote, Manager Stark had been in consultation with Judge Abbott, one of the Directors of defendant corporation, as to some method by which the plaintiff corporation should be made to bear a portion of the interest on the cost of the new station, and the vote above recited was the result of that conference.

Stark's 2d Dep. 116th Ans., Rec. p. 142.

The vote itself was framed either by Stark or Abbott, and was by Abbott brought before the joint meeting of July 23, 1872, at which meeting no business was transacted except such as arose under the joint contract.

Plaintiff's Ex. 4, Rec. p. 53
Stark's 1st Dep. 15th Ans., Rec. p. 56

On July 22, 1872, Judge Abbott had written the Manager requesting him to have the meeting to be held July 23, adjourned from the morning hour to the afternoon, to enable him (Abbott) to be present with the votes prepared by him as to the payments of interest on the improvements of defendant corporation.

Stark's 1st Dep. 15th Ans., Rec. p. 56

Manager Stark himself (the originator of this vote of

July, 1872) understood that no such application of the joint receipts as therein proposed could be lawfully made except by procuring an amendment of the old traffic contract.

Stark's 2d Dep. 156th and 157th Ans., Rec. p. 151.

After the passage of this vote, the cashier of the joint management, by direction of the Manager, paid over to the defendant corporation from the joint funds in his hands from time to time during the six and a half succeeding years for interest on the cost of defendant's improvements at Boston the amount in all of $603,884.47, thirty-one per cent of which, $187,204.18, is here attempted to be reclaimed by the plaintiff with interest since date of suit, April 17, 1880.

Bartlett's 1st Dep. 9th and 14th Ans., Rec. p. 73 & 74.

Interest to defendant on the cost of its railroad shares.

Soon after the defendant corporation engaged in the project of rebuilding and enlarging its Boston passenger station, it bought up a controlling interest in the capital stock of two other Massachusetts railroads, the Lowell & Lawrence, and the Salem & Lowell, at a total cost of $345,674.

The Manager (Stark) had recommended this purchase to the defendant corporation, and the purchase was made, in 1871, at his suggestion, upon the oral understanding on the part of the plaintiff's Directors (as he states) that the plaintiff corporation should assume thirty-one per cent of the interest on the purchase money, or that the joint funds should be used to pay such interest to defendant company.

Stark's 2d Dep. 75th Ans., Rec. p. 131
Abbott's Dep. 25th Ans., Rec. p. 84
Abbott's Dep. 55th Ans., Rec. p. 97.

No formal action was ever had on this subject at any meet-

ing of the joint boards or of the Directors of plaintiff corporation alone.

The amount of joint funds taken and paid to defendant corporation on this score alone from Oct. 1, 1871, the end of the contract, was in all $95,730.35, thirty-one per cent of which, or $29,676.41, with interest thereon from April 17, 1880, is also reclaimed by the plaintiff in this suit.

Bartlett's Dep. 8th Ans., Rec. p. 72.

Manager Stark made or directed the making of these semi-annual payments to defendant corporation, in reimbursement of interest accrued on its debts, until March 31, 1875, when he resigned his position as Manager.

He had begun to pay defendant interest on the cost of its railroad share purchase ($345,674) as early as Oct. 1, 1871, with a payment of $6,017.69, and had continued such payments every six months, and had paid out in that way in all $43,416.25 without any authority, excepting such as the oral assent of the individual Directors of both roads associated with him in the management might afford.

As to the larger payments made to provide for interest accruing on the depot debt of defendant, the Manager by the vote of July 23, 1872, had secured such protection to himself personally as the written assent of said Directors expressed in the form of a vote could afford, whatever that protection might be.

Plaintiff invited to share defendant's interest account.

Soon after Stark ceased to be Manager and shortly before the expiration of the time limited by law for the consolidation of the two roads, an attempt was made on the part of the defendant corporation, or its Directors, to procure the execution by the plaintiff corporation of a formal contract

by which the plaintiff company should agree to bear thirty-one per cent of all interest charges incurred by defendant, both in its purchase of the railroad shares and in making its Boston improvements. The inducement or consideration held out to plaintiff for making such a contract was the proposed offer of defendant corporation in the same contract to bear sixty-nine per cent of the interest assumed by plaintiff in building its new freight house at Lowell at a total cost of $102,186.24.

Bailey's 2d Dep. 95th Ans., Rec. pp. 176.

In this proposed new contract it is recited that plaintiff had, since the inception of contract, rebuilt its freight station at Lowell, at a cost of $102,186.24, and that defendant corporation had taken land and rebuilt and enlarged its Boston passenger station and its Winchester passenger station, and had invested $345,674 in the stock of other railroads, and made other improvements of its railroad property (all at a total cost or expense of $1,836,410.38), and it (the proposed contract) provided that in the current settlements under the said contract of 1857, and during the term of said contract, the defendant corporation should assume and account for sixty-nine per cent of the interest on the cost of the plaintiff's new freight house, and that the plaintiff corporation should assume and account to defendant for thirty-one per cent of the interest on the cost of each and all of its said improvements at Boston and railroad share purchase.

The plaintiff had made an outlay upon its property of $102,186.24. The entire annual interest upon this outlay, reckoned at six per cent, would be only $6,131.17. By the proposed new contract for embodying alleged oral understandings never reduced to writing, the Boston & Lowell Corporation offered to assume and pay to plaintiff sixty-nine per cent of this yearly interest during the contract, and

asked the plaintiff corporation in return for this to assume thirty-one per cent of the interest upon the cost of the defendant's improvements.

Operation of proposed interest contract on plaintiff.

It should be observed in this connection, that by the terms of this proposed contract, which the plaintiff corporation was asked by Directors of Boston & Lowell Corporation, in their joint meetings held under the management, to adopt and subscribe, the plaintiff would have been committed in writing not only to an observance of the provisions of the vote of July 23, 1872, but to the adoption or ratification of the course of the Manager (Stark) in paying interest to the defendant from the joint funds on the additional amount of $345,674 previously invested in the share purchase, the principal of all such sums expended by the defendant amounting to $1,836,410.38, or two and a quarter times the amount of the plaintiff corporation's whole capital stock. In consideration for this act requested of plaintiff, the plaintiff was to receive from defendant sixty-nine per cent of its interest on $102,186.24 only; in brief, the plaintiff, in consideration of the receipt from defendant yearly of $4,230.45, was to become liable to defendant yearly for $34,157.22, *i. e.*, plaintiff was to pay defendant $29,927 more than it was to receive from the defendant. This reduction of plaintiff's share of the net earnings by the sum of $30,000 per annum taken therefrom by the Manager, as supervised by the two boards, and bestowed on the defendant corporation under the vote of July, 1872, very soon resulted in depriving the stockholders of plaintiff corporation of all dividends whatever.

Exhibit Lovering 43d Rept., Rec. p. 290.

Change of plaintiff's directors, 1877, and results thereof.

This state of things led to an overturn in the old Board of Directors of plaintiff company at the annual meeting held in May, 1877, and to instructions being given by the stockholders to the new Directors to make investigation as to the methods of administering the affairs of the two roads under the contract.

Lovering's Dep. 14th Ans., Rec. p. 185.

This investigation was made by the plaintiff's new Directors. The existence of the vote of July, 1872, was then brought to light or to the knowledge of those new Directors for the first time, and they thereupon, on the 25th of June, 1877, passed a vote to rescind the vote of July, 1872, and gave notice of such rescission to the defendant's Directors.

Plaintiff's Ex. 8, Rec. pp. 61–63.
Bailey's 1st Dep. 3d Ans., Rec. p. 75.
Abbott's Dep. 56th Ans., Rec. p. 97.

No notice whatever was taken by the defendant's Directors or by Manager Hosford of this vote of plaintiff's Directors rescinding the so-called vote of July, 1872.

Abbott's Dep. 56th Ans., Rec. p. 97.

At the next annual meeting of plaintiff corporation, May 1878, the plaintiff's Directors made a full report of the situation of affairs between the two roads, setting forth how they had become informed for the first time of the existence of the so-called vote of July 23, 1872, and of the vote they had passed June 25, 1877, for rescinding said vote of July, 1872, and the further fact that the Manager (Hosford) had continued to make the interest payments to defendant cor-

poration after their vote of June, 1877, and that defendant's Directors had refused to take any notice of the remonstrances of the plaintiff's Directors against the Manager's course in this respect.

Complainant's Exhibit Lovering, Rec. pp. 290–293.

Upon the presentation of this report the stockholders of plaintiff company passed a vote instructing the Directors to take proper measures for recovering the share of plaintiff in sums so passed over to the defendant corporation by the two Managers from the joint fund.

Dep. Lovering, 15th Ans., Rec. p. 186, top.

Although this proposed contract for committing the plaintiff corporation to a contribution from its share of the joint funds to payment of interest on the $1,836,410 (expended by defendant in its own investments or inprovements) was repeatedly brought before the joint meetings of the Directors held in the summer of 1872, as above stated, it was not acceded to by the Directors of plaintiff corporation or any of them so far as appears from the record of the joint meetings. Notwithstanding this fact, however, the payments of interest to defendant were continued by the Manager to the end of the contract, in defiance of the vote passed by plaintiff's new Board of Directors, June 25, 1877, for preventing such payments. Manager Hosford persisted in this course after June, 1877, with full knowledge that the plaintiff corporation deemed it to be in plain violation of its rights under the contract.

It was the course of business for the managing agent to make a division of the net earnings in his hands between the

two corporations semi-annually, by making drafts upon the cashier Bartlett therefor, payable to the respective treasurers of the corporations. A sample of these drafts is printed at p. 207 of the record, top.

Rec. p. 72, Bartlett's 1st Dep. 6th and 7th Ans.
Rec. p. 206, Bartlett's 2d Dep. 40th and 41st Ans.

From and after Nov. 7, 1872, the managing agent was regularly debited by defendant corporation in account for the items of interest accruing on its investments in railroad shares and improvements, at intervals of six months, and these interest charges were thereafter deducted by the Manager from the net earnings in his hands, before making up the balance (or 31 per cent) of such net earnings to be paid over to the treasurer of plaintiff corporation.

Rec. pp. 195 and following.

The entire amount of such interest charges was then paid over by the Manager to the defendant corporation.

Rec. p. 22, Sect. 17 of Deft. Co.'s Ans.

The plaintiff was unable to make Manager Stark a party defendant to its bill, because of his residing in a different judicial district from the other defendants.

The plaintiff seeks to establish the liability to it of both defendants upon the ground that the managing agents, being from time to time in the receipt and possession or control of the entire net income of both roads under the pooling contract, failed to distribute the same pursuant to the fourteenth article of the contract (Rec. p. 13), but made deductions therefrom of sums amounting in all to $699,614.76, and applied the same in reimbursing the defendant corporation all the interest accrued and accruing upon its invest-

ments in the improvement of its own property in or near Boston, say $603,884 41

and in the purchase of shares in other railroads, say 95,730 35

$699,614 76

the effect of which doings of the two Managers was to deprive the plaintiff of 31 per cent of the sums so deducted, viz., $216,880.57, which it would have received (more than it did receive) had the Managers made division of said net earnings in the ratio fixed by the pooling contract.

The liability of the defendant corporation arises as is charged from the fact that it received these sums at the hands of the two Managers in excess of its proper share of the net earnings.

The liability of Manager Hosford's estate arises, as is charged, from the fact that in passing over these sums to the defendant Company, he was violating the trust attached to or impressed upon thirty-one per cent thereof as the sole property of the plaintiff, unless it is made to appear that this thirty-one per cent of the fund had been freed and discharged of the trust by reason of some modification of the terms of the pooling contract relating to the division of the income.

Rec. p. 54, 55, Stark's Dep. Ans. 3d to 8th.

Defence as set forth in answer of defendant corporation.

The defendant corporation admitted in its answer the receipt by it through the cashier, Bartlett (but not through Stark or Hosford), of all the sums claimed by plaintiff (Rec. p. 24, Sect. 27), and based its defence upon the ground that it was entitled to the same, either in pursuance of the pooling

contract itself, or because of certain subsidiary or additional contracts subsequently engrafted thereon by the two corporations, as was alleged, the subsidiary or additional contracts so referred to being (as we understand) certain agreements said to have been arrived at *orally* between the individual members of the two Boards of Directors, though not evidenced by any formal action of said Directors committed to writing or made matter of record in any way.

Rec. pp. 22, 23, Ans. of B. & L. R. Co. §§ 17, 19, 20.

Another defence was set up by both defendants in their answer, viz., that plaintiff's claims in suit had been submitted to arbitration, and that the arbitrators had made an award adversely to such claims and in favor of defendant corporation.

As this defence was met by the plaintiff with evidence of an adjudication to the effect that the power of the arbitrators had been revoked by plaintiff before award made, and as the alleged award did not enter into the decision of the court below, we do not deem it necessary to notice it further.

The defence first mentioned was sustained, and the court below held that, either independently of the traffic contract or as supplementary thereto (Rec. p. 410, near bottom), and by reason of certain oral agreements made by the plaintiff's directors, or imputed to them by the judge, the plaintiff had become bound and concluded as to the several payments of interest taken out of the net earnings and paid over to defendant company.

The issue so raised by the pleadings and treated by the court below as the basis of its decision in favor of defendants was, *Whether the plaintiff corporation did become lawfully bound to bear or contribute thirty-one per cent of the amount of all defendant corporation's interest charges, or any part thereof, during the entire term of the pooling contract by reason of the oral agreements or understandings to that effect between the Directors of the two contracting corporations.* If so, then

the decision of the court below was correct; if not so, then that decision was certainly wrong as to that part of the amount taken from the plaintiff's quota of the net earnings and devoted by the Managers to the payment of interest upon the investment of defendant corporation in certain railroad shares ($29,676.41), because these particular payments were never sanctioned by any vote or other formal action of the Directors of either of said corporations.

Although the single issue presented by the pleadings and sustained by the court below (as shown by its opinion) related to the validity of the oral contracts said to have existed between the two Boards of Directors, and although, if that issue was decided wrongly, the plaintiff would be and is entitled to recover a part at least of the amount claimed by it, viz., $29,676.41, yet the defendant corporation below did take the ground as to the other and larger claim of the plaintiff to thirty-one per cent of the amount of all interest paid it on the cost of its Boston improvement (viz., $187,204.18), that it was entitled to the same under or by virtue of the vote of July 23, 1872, and this point will be referred to by us later on in this brief.

By the traffic and pooling contract first entered upon in 1857 for a term of three years, and afterward, in 1858, adopted by the stockholders, and by them extended for a term of twenty years, the two railroads and the receipts or earnings thereof were taken out of the Directors' hands, and placed in the possession and control of a common managing agent, the ordinary functions of the Directors as general managing agents (so far at least as the provisions of the contract extended) were suspended, and the special agency or control of a single person substituted in their place.

This substitution was complete and exclusive, at least as to all matters expressly provided for in and by the terms of the contract itself, since otherwise there would have been, not only a special agency management of both these railroads reposed in one person (not being a director at all), but also a general agency management of each by a Board of Directors

elected by the stockholders, and such a state of things would of course have resulted in utter confusion and conflict.

The single managing agents employed under this contract cannot be deemed the mere agent or representative of the Directors, since the law would not permit directors of corporations to delegate to others the exercise of their usual powers in any matters involving discretion. — 1 Wood's Railway Law, p. 406, § 154.

But as to such matters as were not clearly provided for by the traffic contract this special agent was not left to the free exercise of his own discretion alone, but was subjected to the supervision and control of both Boards of Directors when acting together or in concurrence with each other, but not to the control of either Board of Directors when acting separately or alone.

Rec., p. 11, Art. 5.

With these qualifications the single and special managing agent was by the contract and the rules adopted for its execution substituted for or in place of the Directors themselves (in each corporation), and put forward as the . . . head of the joint companies to direct and control their affairs in every department.

Rec. p. 69, Middle, Rules Ex. Service.

By the terms of the contract (as understood by us) each corporation contributed its railroad or plant, in its then existing condition, including all stations, buildings and fixtures pertaining thereto, and the receipts or earnings to be derived therefrom, and placed the same in the hands of this special agent or manager. He was to pay over to the treasurer of each corporation the balance or net earnings of the two roads semi-annually in the ratio of thirty-one per cent

thereof to the plaintiff's treasurer, and sixty-nine per cent to the defendant corporation's treasurer.

Rec. pp. 12, 13, Arts. 8 and 14.

This ratio of division of the net earnings was (as we understand) predicated upon the relative earning capacity of each road in the condition in which it was at the inception of the contract.

It was not confided to the discretion of the managing agent either alone or with the concurrence of the two Boards of Directors, or either of them, to make any modification whatever in the terms of this traffic or pooling contract, the execution of which had been committed or entrusted to him by the two corporations acting through their stochholders respectively.

LAW.

I.

In order to eliminate from this case a question which might, possibly, be made the basis of a decision adverse to the plaintiff in the case, we propose to take up this question as a preliminary one in the first place, namely, the question whether, *consistently with the terms and provisions of the twenty years' traffic contract as originally framed*, the special agent or manager, either alone or with the concurrence and support of the two Boards of Directors, was at liberty to take the net earnings or receipts of the two roads remaining in his hands at any time undivided, and devote or appropriate the same, or any part thereof, to the payment of interest of debts of the defendant corporation incurred in making improvements of its own property or plant, or in the purchasing of outside property for investment.

We think this question must be answered in the negative.

It is expressly provided by the fourteenth article of the contract (Rec. p. 13, bottom) that interest upon the debts of either party must be paid out of the separate share of such party and not from or out of the common fund.

By the eighth article of the contract (Rec. p. 12) it is provided that the relative condition or state of repair of the two roads should be maintained the same as at the inception of the contract, "as near as may be," so that neither party should be a gainer by the use of the joint funds upon its own road, even by way of repairs.

By Article 15 (Rec. p. 14, top) of the contract, it is declared in terms to be a business or traffic contract only, and not a union of the corporate powers or privileges of the two companies. Under these circumstances it is not likely to be claimed that the managing agent had any such power

unless it can be found under that clause (Art. 14) of the contracts which provides that income and expense accounts shall be made up monthly and kept and accurately closed and balanced from time to time semi-annually, under which clause it was the duty of the managing agent to cause these accounts to be so made up and balanced; and, therefore, it was necessarily left to him to determine, in the first instance, which of the sums actually disbursed in the course of the business should go to make up the account of operating expenses.

The above inquiry seems then to be resolved into another, viz.: Whether the manager, under his conceded authority to determine, in the first instance, the manner of making up the income and expense accounts, could consistently with the contract and with his duty to the plaintiff under the same be permitted to apply any portion of the joint earnings remaining undivided in his hands to reimburse the defendant company the amount of interest paid or incurred upon its debts, and justify this proceeding by calling such interest money operating expenses arising under the contract?

While we concede it was within the legitimate province of the manager under the contract, not only to make up the expense account of both roads, but to set aside and devote a sufficient amount of such earnings to pay and discharge all legitimate expenses of operating the two roads, we deny that in the exercise of this power the Manager could properly use the joint earnings or any part of them in providing for the debts of one of the parties or the interest thereon, and justify himself to the other party in so doing, and we think it hardly probable that any such position as this will be taken.

The cashier, Bartlett, being an experienced railroad ac-

countant, and also the treasurer of defendant corporation at the time, and the very same person who was directed to make up this interest account and pay the amount of the same over to the defendant corporation as making or constituting a part of the expenses of operating the two roads under the contract, being under examination as a witness in this case, was asked whether in his judgment such expenditures as defendant corporation had made on its new station could be properly regarded or treated as expenses of operating the defendant's railroad. His answer was, "No, sir."

Bartlett's 1st Dep. 16th Ans., Rec. p. 74.

We are however, under no necessity of arguing at this late day, whether the interest of debts incurred in constructing a railroad makes any part of the expense of operating the road when constructed.

This very question, as also the meaning of the term "operating expenses," have been the subject of legal investigation and have been settled by this court; and it has been determined that expenses incurred in original construction or subsequent enlargement and improvement of the corporation plant, belong to "capital" account and cannot be properly classified as "expense" account.

Union Pac. R. R. *v.* U. S., 99 U. S. 402.

In delivering the opinion of the Court in this case, Bradley, J., said: —

"As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in

operating the works and keeping them in good condition and repair; while expenses chargeable to capital include those incurred in the original construction of the works and in the subsequent enlargement and improvement thereof."

II.

While it may not be claimed by defendants that the Manager in the legitimate exercise of his function of making up the expense accounts of the two roads, could convert the interest charges of either party into expenses incurred by himself (the manager) in operating the two roads, by simply declaring them to be so, yet it will probably be contended that the Manager was fully authorized to do this very thing in this case to the extent of the interest arising from the cost of defendant's Boston improvements ($603,884.47), by the vote of the two Boards of Directors passed at their joint meeting held July 23, 1872.

To this position (if taken) we reply that the two Boards of Directors could have no greater power than the Manager himself to override in any way the provisions of the traffic contract then in process of execution, nor could they confer any power on the Manager alone to do this. It was unquestionably the province and duty of the Manager to make up the expense account, justly and truly according to the facts, and, after meeting all proper operating expenses, to divide the balance or net earnings between the two contracting parties in the manner fixed and determined by the contract itself.

The money remaining to be divided was in the hands of the Manager or his subordinate and appointee (the cashier), and not in the hands or possession of the Directors, and as the Directors had no physical possession or control over this money, they were under no accountability therefor to either party. This accountability attached to the Manager alone.

Again, as to so much of this interest money as was paid over to the defendant corporation by or through Manager Hosford (he being at the time both a director and large stockholder of the defendant company), Rec. page 16, Ans. Hosford's Executors, near top), and at the same time bound as trustee to protect the interest of his *cestui que trust* (the plaintiff) to the extent of its interest in this fund, we submit that his (Hosford's) executors cannot now be permitted to set up the defendant's interest claim or any adverse claim whatever, and especially that he (Hosford) should not be permitted to use his position as trustee of the plaintiff to promote in the slightest degree his own personal interest as a large shareholder in the defendant corporation.

Morrison *v.* Caldwell, 5 Mon. 435.
Lewin on Trusts (8th Eng. ed.), 285.
Underhill on Trusts, p. 126, Art. 41.

III.

If, however, our position in this respect is untenable, and it was within the lawful power of the two Boards of Directors, when acting in concert, to direct the Manager to treat interest on defendant's debts as constituting operating expenses, and to justify him in using the joint funds in that way as against the plaintiff corporation, yet after a time (June 25, 1877) the Manager ceased to have the authority of these two Boards of Directors for making such interest payments, and thereupon, as we submit, became personally accountable to the plaintiff for thirty-one per cent of all the joint earnings thereafter taken and used by him in that way.

Immediately after the discovery, made by the new Board of plaintiff's Directors (elected in May 1877), of the existence of the vote of July 23, 1872, this new Board proceeded at once by its own vote to pronounce the former vote null and void and to rescind it altogether.

Rec. p. 63, top; plff's Directors' vote of June 25, 1877.

Due notice of the action so taken by plaintiff's new Directors was given to the defendant.

Rec. p. 75, Bailey's Dep. 3d and 4th Ans.
Rec. p. 97, Abbott's Dep. 56th Ans.

Notwithstanding this rescission and repudiation by the plaintiff's Directors, June 25, 1877, of the joint vote of July 23, 1872, Manager Hosford paid no attention to it, but continued to make the interest payments to defendant corporation as before, and subsequently disbursed to defendant company, for interest on Boston improvements alone, the amount in all of $169,154.40, of which amount thirty-one per cent, or $52,437.86, belonged wholly to the plaintiff, according to the contract ratio of division; and for this sum at least $52,437.86 (as we submit), the executors of Hosford must be held liable in this case, unless it shall be found by this court, (as it was apparently by the court below), that Hosford was relieved from all liability whatever to the plaintiff, by reason of the oral agreements or contracts as to all these interest payments concluded between the two Boards of Directors before July 23, 1872; and unless this court shall also find that these alleged oral agreements or contracts continued in force or operation during the whole term of the traffic contract, so that the new Board of plaintiff's Directors, elected in May, 1877, were unable to put a stop to such payments.

IV.

We now recur to the main question upon which the decision of the court below appears to have turned, viz., the question, whether the interest payments of $699,614.76, to the defendant corporation during the term of the joint traffic contract were lawfully authorized by reason of the alleged

subsidiary or additional contracts or arrangements referred to by defendant corporation in the 17th section of its answer in this case?

Rec. p. 22.

The subsidiary or additional contracts so referred to in the 17th section of answer are fully set forth in the 19th and 20th sections of said answer, the 19th section relating wholly to the interest paid defendant company on its investment in railroad shares ($95,730.35), and the 20th section relating wholly to interest paid on the cost of the improvements made at or near Boston ($603,884.47).

As to the first of these interest payments ($95,730.35), the statement of the defendant in its answer (Sect. 19) was as follows: —

"In 1872, it was deemed necessary for protection of the joint business and interests of the parties to the traffic contract to obtain control of the Salem & Lowell and the Lowell & Lawrence Railroads, and it was thereupon agreed between said parties, that if the Boston & Lowell Railroad Corporation would buy a majority of the stock in said companies that it should be paid seven per cent (semi-annually) upon the money used for the purchase of said shares during the continuance of the contract. With the full knowledge and consent of the other party to the contract, the Boston & Lowell Railroad Corporation thereupon bought a majority of the shares of stock of the two companies aforesaid, and paid therefor the sum of $345,674, and interest upon said sum was thereafter paid to the said Boston & Lowell Railroad Corporation with the full knowledge and consent of the second party (*i. e.*, party of the second part to joint traffic contract and plaintiff in this case) until the termination of said contract."

It is not claimed by defendant, and is not true, that any of the agreements here referred to were ever put in writing, or signed by either party, or by any one claiming to represent them; on the other hand it is conceded that such agreements became operative and binding upon the plaintiff corporation, if at all, by reason of the fact that the Directors for the time being of the plaintiff corporation while the Manager was engaged in carrying the contract into execution, in their oral conferences with the Directors of defendant corporation at their joint meetings, had orally given their unanimous consent to the making of such interest payments.

The plaintiff does not deny that such oral agreements or assents were had and exchanged between the several persons comprising the members of the two Boards of Directors.

The plaintiff does, however, deny that any such oral agreements were had or made previously to the purchase by the defendant corporation of the railroad shares in question, or that such purchase was made in consequence of such previous oral agreement of the plaintiff's Directors that the plaintiff corporation would share or participate in the interest reckoned at seven per cent upon the price or cost of said purchase, or that there is any evidence to that effect in the case. On the contrary it does appear in evidence that neither the Directors of the Boston & Lowell Railroad Corporation nor that corporation itself were authorized by law to purchase these shares. The evidence also shows that these shares were purchased prior to Sept. 30, 1871, although it is stated in the foregoing extract from defendant's answer that the shares were purchased some time in 1872.

Rec. pp. 94, 95, Abbott's Dep., Ans. 49, 50 and 51.

There was so much doubt as to the lawful right of the Boston & Lowell Railroad Company to become a pur-

chaser of this stock, that it was not deemed prudent to take title thereto in its own name but in the name of certain individuals as trustees for the corporation.

Rec. p. 95, Abbott's Dep., 50th Ans.

At the time of defendant's purchase of the railroad shares, and for thirteen years or more previously, the Salem & Lowell and Lowell & Lawrence Railroads had been under lease to the defendant corporation, and had been taken into the joint account, and operated by the Manager under the traffic contract, the net earnings being pooled or divided between them in the same ratio as were the earnings of their own respective railroads. This gave the plaintiff corporation all the benefits that could possibly arise from the ownership by defendant corporation of a controlling interest in the capital stock of these two leased roads, since the lease under which these two roads were held and operated by the Manager was to continue as long as the joint traffic contract itself, viz., for twenty years from Oct. 1, 1858.

Bartlett's 2d Dep. Ans. 132–5, Rec. p. 221.

Under these circumstances we submit, that the interest payments made from the joint funds to defendant corporation upon the price or cost of the railroad shares were not legally authorized or justified by the subsidiary or additional *oral* contracts said to have been made by plaintiff's Directors to that effect. In support of this position, we offer the reasons following: —

1. The Directors of the two corporations, while sitting and conferring together as to the proper mode of carrying into execution the joint traffic contract, were not acting or entitled to act as the lawful representatives of either corporation as to any matters of business regulated by, or within the scope of the contract.

2. If the Directors respectively of each corporation, while sitting together at these joint meetings, might properly take action upon or with reference to the separate affairs and interests of the two companies lying outside of the contract, yet we submit that they could only do so effectively by some instrument reduced to writing and signed, or put in the form of a vote passed or adopted by them so that their respective principals or constituents might have some evidence of their proceedings and some means of understanding their own rights in the premises. The executory agreements of corporate directors, made orally and not committed to writing by vote or otherwise, do not subject the corporate body itself to any liabilities whatever.

Edgerly *v.* Emerson, 23 N. H. 568.
Schuman *v* Seymour, 24 N. J. (Eq.) 153.
Stoystown Turnpipe Co. *v.* Craner, 45 Pa. St. 386.
Cammeyer *v.* Churches, 2 Sand. Chan. 229.
Ditrey *v.* Lamar R. Co., 4 Hurl. & C. 463.
Ross *v.* Crockett, 14 Louis. An. 811.
Young *v.* Blackhawk Co., 66 Iowa, 460.
Johnson *v.* The City, 5 Phila. Rep. 445.

3. Again in order that these oral agreements of the plaintiff's Directors should become binding upon the corporation as its own contract, it was necessary that they should have been based upon some consideration valid in law. Such consideration appears to have been wanting in the case of these oral agreements on the part of the plaintiff's Directors.

If at the time of the alleged contract with defendant's Directors, that corporation had not purchased the railroad shares and had no legal right to acquire them by purchase, then its proposal or offer to make the purchase would not constitute, of itself alone, a consideration suffi-

cient in law to support a promise on the part of plaintiff's Directors to contribute any sum whatever in aid of such purchase.

Again, if at the time of the allegedcontract of plaintiff's Directors to contribute to these interest payments, the defendant had already become the owner of said shares, and if the defendant was to remain and did remain the sole owner of the shares, then the plaintiff derived no pecuniary benefit whatever from the defendant's purchase, and the supposed promise of the plaintiff's Directors to bear a portion of the cost or price paid for the shares, or of the interest thereon, was wholly gratuitous and so not enforceable in law.

Cottage St. Church *v.* Kendall, 121 Mass. 528.
Burke *v.* Smith, 16 Wall. 395 (remarks near top).

4. But whether the foregoing reasons assigned by us are sound or not is of no importance, since it was clearly beyond the legal power or capacity of the plaintiff's Directors to bind the corporation by contract in any way to contribute to the payment of interest upon the cost of the shares purchased by defendant, because it would not have been competent in law for the plaintiff corporation to have entered into a contract with the defendant corporation for that purpose under any conceivable form.

Pearson *v.* Concord R. R., 12 Am. & E. R. R. cases, 102.
Allerton *v.* Railroad, 18 Wall. 234.
Thomas *v.* Railroad, 101 U. S. R. 71.
Davis *v.* Old Colony R. R., 131 Mass. 225.
Milbank *v.* N. Y. & N. E. R. Co., 64 How. 20.
Penn. R. R. *v.* St. L. A. & T. H. R., 118 U. S. 290.
Mallory *v.* Han. Oil Works, 86 Tenn. (2 Pickle), or 4 R. R. & Corp. L. J. 202.

Some of the cases just cited were referred to by the court below in its opinion, (Rec. p. 410, near bottom) as merely limiting the power of directors to the ordinary business transactions of corporate bodies. That court did not seem to perceive that the cases cited apply to the corporate bodies themselves as well as to the directors, and are therefore decisive of the case at bar, unless it is true, as held by the court below, that agreements by one corporation to assume and pay interest on the debts of another corporation belong to and fall within the ordinary business transactions of corporations.

Rec. p. 410, bottom.

There is, however, this difference in the grounds of defence to the claim to recover for the interest of the railroad share purchase (in 19th section of the answer), and the grounds of defence to the claim for interest paid on Boston improvements. As to the latter claim the defendant corporation relies not only on the alleged oral agreements of the Directors, but also "upon the vote of the Directors of the Nashua & Lowell Railroad Corporation" (meaning the vote of July 23, 1872) as constituting in itself an agreement. The statement in this respect is that large sums of money were expended by defendant corporation on the Boston improvements in reliance upon receiving such interest from the plaintiff, meaning, as we suppose, to take the point that the vote itself furnished the inducement to defendant company to make the outlay in question, and therefore affords a legal consideration to support the promise (if any) on the part of the plaintiff, said to be contained or embodied in the vote.

V.

The cases just cited by us to show that the alleged agreements of plaintiff's Directors afford no defence to plaintiff's claim to recover the amount taken from it by the Manager in paying interest to the defendant company on the purchase money of the railroad shares, also show that plaintiff's Directors were not any more competent to dispose of plaintiff's money in paying interest upon the cost of improvements of property of the defendant corporation at Boston, (the sums so taken from plaintiff in this way aggregating to $187,156.30.)

Hence these cited cases would, we submit, be decisive as to the entire amount in controversy in this suit, if the defendant had no other answer thereto, than that made to the plaintiff's recovering the items of interest paid defendant corporation on account of railroad share investment as set forth in the 19th section of its answer and that set forth in the 20th section of its answer relating to the Boston improvements; the latter setting up the vote of July, 1872, as operating to induce defendant company to build the new station at Boston.

If the Directors had made these interest agreements both orally and in writing they would not (as we understand) be any legal answer to the plaintiff's position that all the alleged contracts or agreements so set up were *ultra vires*, not only as to the Directors, but as to the plaintiff corporation itself, and consequently void.

Let us, however, inquire whether it is true in fact that the sums of money expended by defendant on its Boston improvements were expended by it in reliance upon the vote of July, 1872, as stated in the latter portion of Sect. 20 of the defendant's answer.

Rec. p. 23.

At a joint Directors' meeting held Sept. 28, 1869, the Manager submitted plans for the improvement of the terminal facilities at Boston, . . . and a committee was appointed in reference to the same.

Rec. p. 304.

At the next monthly meeting held Nov. 23, 1869, the committee made a report; that report was accepted and another committee appointed to prepare a location and report the same for ratification at the next monthly meeting of the Board.

Rec. p. 256.

At the monthly meeting held Jan. 24, 1871, the Manager submitted and read an estimate of the cost of the proposed new station house in Boston, and presented plans of the same.

Rec. p. 306, bottom.

At a meeting of the Directors of the Boston & Lowell Railroad Company held Jan. 23, 1872, the record is as follows: The Manager submitted plans and drawings of the contemplated depot building in Boston, when it was voted that the Manager proceed to the erection of the same substantially in accordance with the plans submitted.

Rec. p. 67, top, Cram's Dep. 9th Ans.

By this last vote of the Directors of the defendant corporation, the Manager was instructed to proceed with the erection of the new passenger station six months before the passage of the vote of July 23, 1872, and it appears that the defendant corporation had expended on that work, prior to Nov. 7, 1872, as much as $656,621.09.

Rec. p. 195, 10th line from bottom.

The Directors of defendant corporation, in their annual report to its stockholders for the year 1871 under date of Dec 15, 1871, stated as follows: "We have been enabled to make the usual *dividends, to provide for the increased interest accounts upon investments in the new works*, and to carry to the sinking fund and surplus account the accustomed balances. The steady annual increase of receipts would seem to warrant our confident expectation of being able to keep up full dividends, and *meet the interest upon the expenditures now making and to be made for permanent improvements and increased facilities at the Boston terminus.*"

Rec. p. 92, Abbott's Dep. 46th Ans.

It also appeared from the same report that $293,758.99 had been expended by the defendant company in its Boston improvements prior to Sept. 30, 1871.

Rec. p. 92, middle.

It thus appears to be clearly proved, as we submit, that the Boston improvements were undertaken and proceeded with for a considerable period of time before the passage of the vote of July 23, 1872, and consequently that that vote itself did not operate to induce the defendant corporation to enter upon that particular expenditure. About one half of the cost of the entire structure had been expended before the date of the vote.

It must therefore be seen that the vote of July 23, 1872, even if regarded as a promise by plaintiff's Directors that the plaintiff corporation should contribute to the payments of interest on Boston improvements could not operate as a valid contract to that effect, because, if a promise at all, it was a gratutitous one, not capable of enforcement at law.

There are, however, several other reasons why the vote of July, 1872, cannot be treated as a contract as between the two Boards of Directors by whom the same was passed.

Firstly, it does not purport to be a contract it contains no agreement for the doing of anything by one party to or for the benefit of another party; it purports to make an appropriation of a fund owned in common or by both corporations in aid or for the benefit of one of them, and not an appropriation of the money of one only for any purpose, and the money appropriated was not at the time in the possession or control of either corporation, but in the control of the common agent of both and already bound by a prior and different appropriation.

The apparent object of the vote itself was to give to the Manager the concurrent permission of the two Boards of Directors to use the joint funds in his hands for the sole benefit of one of the two corporations, and the vote might perhaps have had that effect, if it were possible for the Manager to make such a use of the joint funds in his hands consistently with the terms of the traffic contract, with the execution of which he was charged, and himself bound to observe or conform to.

There is also evidence in the case, circumstantial in character, which tends strongly to show that it was not intended by the plaintiff's Directors to contract for the payment of the interest money in question, or part of it, from or out of the proper funds of the plaintiff, for these Directors were solicited in the spring of 1875 to consent to putting this same proposition in the form of a written contract between the two corporations, and they declined it. (See above, pages 14, 15, and 16 of this brief.)

Again, if the vote of July, 1872, had been regarded in 1875 as an existing contract between the parties, there would

have been no occasion for a second contract of the same character.

VI.

The court below, after having discussed at much length what it called the main question (Rec. p. 410), namely, "whether the Directors in law could (and in fact did) bind the plaintiff corporation in respect to the transactions complained of" and after having determined it in the affirmative, then proceeded to observe: "Aside from this there is much evidence going to prove that the stockholders ratified the acts of the Directors. We are aware that this is disputed by the plaintiff, largely on the ground of the manner in which the accounts were kept. Upon the whole, we think the evidence goes to show such an acquiescence on the part of the stockholders (plaintiff) as forbids them after this lapse of time from holding the defendant liable."

If it were true, as was found or assumed by the judge in this decision, that the plaintiff's Directors had power to commit that corporation to liability for the payment of a portion of the interest on the cost or value of property belonging solely to the defendant company, and if they in fact had done this, then such liability had become thereby charged upon the plaintiff corporation, and it was quite unnecessary for the court to consider whether the plaintiff's stockholders had known of or had ratified such acts or doings of their Directors; if, on the other hand, the Directors had no such power, (as we have attempted to show), then nothing of this sort had been lawfully done by them in their agency capacity, and there was nothing for the stockholders to ratify.

Hence we do not perceive how this part of the opinion of the Court adds any force whatever to what had been previously stated as the conclusion of the Court upon the main question. If, however, this Court should be of a different

opinion upon this point, then we desire to state that we know of no evidence whatever in the case going to show that any considerable number of the plaintiff's stockholders (apart from the Directors themselves), prior to May 1877, were informed or made aware of the fact that the defendant corporation had ever been in the receipt (from the joint net earnings) of interest on its investment in railroad shares; and we venture to assert that there is no competent and sufficient evidence in the case that any considerable number of the stockholders had, prior to May, 1877, been informed of the use made of the joint funds in paying to defendant corporation its interest upon the cost of its Boston improvements.

The facts on this subject are fully set forth in the Forty-third Annual Report of the plaintiff's Directors to the stockholders for the year ending May 29, 1878, being complainant's Exhibit Lovering, printed at p. 290 of the record in this case. In this report (Rec. p. 171, middle) is found the statement that some of the plaintiff's new Directors (elected in May, 1877) were then entirely ignorant of the existence of the vote of July 23, 1872, and remained so until they had become Directors and had entered upon an investigation of the subject, as instructed to do by vote of the stockholders passed in May, 1877.

At the same annual meeting of the stockholders of plaintiff company at which the forty-third annual report was presented, a vote was passed by the stockholders in which they (the stockholders) declared that they had on that day learned for the first time of the existence of the vote of July, 1872, and of the fact of moneys having been taken from the joint funds and used for the sole benefit of the defendant corporation under that vote.

Rec. p. 186, top.

This very vote was copied and set forth in full in the opinion delivered by the court below.

Rec. p. 409, near bottom.

In view of all this, we are at a loss to understand how the judge below could have found and stated, as he did, that the evidence in the case showed such an acquiescence in these payments to defendant on the part of plaintiff's stockholders as to forbid them (meaning to estop them) from holding the defendant liable.

The judge below must have overlooked or forgotten that part of this vote of the stockholders in which they requested the Directors to take proper measures for restoring to plaintiff's treasury the sums so diverted by or for the benefit of the defendant company.

Again, if it were necessary to the defence of this case to show such a ratification of these payments by the stockholders of plaintiff corporation as to estop them from seeking to hold defendant liable, it must have been made to appear that all the plaintiff's stockholders had so ratified, in view of the law, as understood by us, that the acts to be so ratified in this case were clearly *ultra vires*, even as to the corporation itself, and so binding by way of estoppel upon such stockholders only as had personally assented to the same.

Zabriskie *v.* Hack. R. R. Co., 18 N. J. Eq. 178.
Gifford *v.* N. J. R. R., 2 Stock. 171.
Mallory *v.* Han. Oil Works, 86 Tenn. (2 Pickle).
Keene's Executors Case, 3 DeG. M. & G. 279.

VII.

The Court below at the close of its opinion introduced the words following: "Again, *this contract has been executed*. It expired in 1878"; and thereupon the Court proceeded to cite or refer to the rule of law that the "executed dealings of corporations must be allowed to stand for or against both parties when the plainest rules of good faith require it."

If it were true that this traffic contract had been carried into complete execution by the parties to it in a particular way, this fact might have been a good answer to the claim of the plaintiff corporation to a rectification of the accounts, or to the making of any inquiry whether it had failed to receive what was its due under said contract.

In this case, however, the execution of the contract was committed to a third person termed a Manager, or managing agent, for both parties; the terms of the contract were duly observed by this common agent for about fifteen years, but after that time the common agent failed to conform to that part of the contract relating to the division of the net earnings between the two contracting parties, so that the plaintiff, instead of receiving thirty-one per cent of all net earnings, was allowed thereafter and during the latter years of the term to receive much less than thirty-one per cent of the same, by reason of deductions made by the Manager from the plaintiff's quota and paid over to the defendant, in addition to its proper quota of sixty-nine per cent of said net earnings.

This deduction from plaintiff's share, and payment to defendant, was made (as plaintiff says) by the Manager, in violation of the contract and of his duty to the plaintiff as trustee for it of the funds so taken away. As soon as the stockholders of plaintiff company became aware of this diversion they elected a new Board of Directors, instituted an

investigation and instructed the new Directors to take legal measures for redressing this alleged breach of trust. Under those instructions this suit was commenced in April, 1880. Manager Hosford, at the same time a director and large shareholder in defendant corporation, persisted in making these deductions from plaintiff's share of income and paying them over to defendant company, after the plaintiff's new Directors had undertaken to interpose in the matter by passing the vote of June 25, 1877.

Supra, p. 18 of this brief, middle.

After this vote of June 25, 1877, Manager Hosford paid over to defendant corporation $52,437.86 of the plaintiff's money, as we say.

According to the opinion of the judge of the court below neither Hosford's estate nor the defendant corporation can be held accountable for this money, because it was paid out by one and received by the other, in pretended conformity with the terms of the contract, as originally framed or modified.

The judge in making this statement, (as he did,) seems (unconsciously as we suppose) to have begged the question in dispute by assuming that the contract had been executed according to its terms. This was the bone of contention in the whole case.

The defendant corporation itself took no such ground. It is not set up in the answers, and the point seems to be made by the judge, not as forming any ground for his decision, but as tending perhaps to corroborate a decision based wholly on other grounds.

Whatever may have been the judge's notions of the matter we think further comment unnecessary on this point.

Railway Co. *v.* Keok. Bridge Co., 131 U. S. 389.

According to our understanding of this case, the court below in stating as it did (Rec. p. 410, middle) that the main question for decision was "whether the Directors" (of plaintiff company) "could bind the corporation in respect to the transactions complained of," entirely mistook the real issue in the case, as well as the position taken by the plaintiff in its argument.

"The transactions complained of" in the plaintiff's bill are not transactions of the Directors of the plaintiff company, but the transactions of the special agent or agents of the plaintiff, consisting in the application by them successively of funds, belonging to both corporations jointly, in paying or providing for the interest upon the debts of the defendant corporation alone; yet the court below, laboring apparently under the misapprehension that the questions before it were, first, as to the authority for these payments having been given by the Directors of the plaintiff, and secondly, as to the legal competency of the Directors to bind the corporation in that way, (Rec. p. 410, 7th and 8th lines from top) decided both these questions in the affirmative, and thereupon, and for these reasons chiefly, or wholly, dismissed the bill.

We have followed the reasoning of the court below in reaching this result, and endeavored to show it to be erroneous. If we have succeeded in this, it is enough for our purposes. But we think the same result could be reached through a much shorter cut, by confining the argument to the real and more simple question in the case, which, as we respectfully submit, is *whether Stark and Hosford, the successive Managers, in passing over to defendant corporation from the interest moneys in their own hands* (as they did) *the interest upon defendant's debts, were acting within the scope of their own authority under the traffic contract, or any other contract by which the plaintiff corporation had become previ-*

ously bound in any way, or to which it had afterwards assented in any way or manner known to the law.

The plaintiff's bill in this case, so far as the defendant corporation is concerned, seeks to trace into the hands or possession of the defendant corporation, certain funds or net earnings passed over to it by the successive managers, Stark and Hosford, in violation of the duty or trust reposed in them by the plaintiff, and to hold those funds as still belonging to the plaintiff, notwithstanding the acts of the managers in bestowing them upon the defendant corporation in violation of the terms of the traffic contract.

The defendant corporation's answer admits the receipt by it of the sums here claimed by plaintiff (Rec., p. 22, § 17), but claims title thereto under certain agreements said to have been engrafted upon the traffic contract. Hence the main issue is whether such alterations were made in the traffic contract as to enable the defendant corporation to retain these sums as its own. The defendant corporation's answer is in the nature of a confession and avoidance of plaintiff's allegations, leaving upon the defendant corporation the burden of showing its right to hold those sums as its own.

As to the other defendants, Hosford's executors, the bill (Rec., p. 7, middle) charges their testator's estate with a liability to account for all sums withheld by the testator from the plaintiff's share (31 per cent) of the net earnings and passed over to defendant corporation, they (Rec., p. 16, middle) make substantially the same defence as defendant corporation; *i. e.*, that if any sums were so withheld it was done with the consent or authority of the plaintiff; and we submit that if plaintiff has proved its charge the burden of showing the alleged authority of plaintiff for taking or withholding these sums is upon the defendants.

A further defence was set up by both defendants in their answers to the effect that the plaintiff and defendant corporations, on Sept. 30, 1882, entered into a submission of the claims in suit to arbitration, and that an award was made thereon in favor of the defendants. (Rec., pp. 16 and 27.)

As to this last named defence it is not (as we submit) available to Hosford's executors, because Hosford was not a party to the submission; he had deceased previously. It is not available as an adjudication in favor of the defendant corporation, because no valid award was ever made under it.

Rec., pp. 285–7; or 139 Mass. Rep. p. 463.

F. A. BROOKS,
Solicitor for Plaintiff.

Office Supreme Court U. S.
FILED,
DEC 9 1889
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 166.

NASHUA AND LOWELL RAILROAD CO., *Appellant*,

v.

BOSTON AND LOWELL RAILROAD CO. ET ALS.

BRIEF FOR APPELLANT.

E. J. PHELPS,
F. A. BROOKS,
Of Counsel for Appellant.

was originally one of the defendants to plaintiff's bill, and charged therein with a direct personal liability to the plaintiff; but the bill has been long since dismissed as to him, and the four lines at bottom of page 3, and the five lines at top of page 4 of the record, do not now make any part of the case relied on by the plaintiff, or deemed correct in fact by it, and should therefore be disregarded.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 166.

THE NASHUA & LOWELL RAILROAD CORPORATION,
Appellant,

v.

THE BOSTON & LOWELL RAILROAD CORPORATION
ET ALS.

BRIEF FOR APPELLANT.

FACTS.

The plaintiff and defendant corporations were respectively the owners of two short railroads making parts of a continuous line of track leading from the city of Boston, Mass., into the State of New Hampshire, and beyond, and connecting with each other at Lowell, Mass., twenty-six miles from Boston.

In 1857 these two corporations entered into a contract with each other for operating together, or pooling the receipts of their two roads, and dividing the net earnings between them in the agreed ratio of thirty-one per cent to plaintiff and sixty-nine per cent to defendant corporation.

The plaintiff was a New Hampshire corporation at first, and was subsequently chartered in Massachusetts, and the two corporations were then united by the Legislative sanc-

tion of both States. The defendant corporation was wholly a Massachusetts corporation.

Under New Hampshire laws as then existing, and as they existed at the time of the commencement of this suit, it was not legally competent for these two corporations to enter into or carry out such a pooling contract.

Bailey's 2d Dep., Rec. p. 179; 105-6-7 Aug.
Burke *v.* Concord R. R., 61 N. H. 160.

The law of Massachusetts was then probably the same in this respect.

The two corporations undertook to get around this legal difficulty by taking their respective railroads and the management thereof temporarily out of the hands of the Directors respectively, in each case, and placing the same and the revenues thereof in the possession of a third person, called a Manager, and by agreeing upon the selection of the same third person as the Manager of both roads, intending thereby that this Manager should be able as the common agent of both parties to do whatever was desirable in the case of either of the two properties, and should be restrained from doing things not acceptable to a majority of the Directors of both companies while acting together or in concurrence in supervision of the special agent thus installed in the place of two separate Boards or bodies of Directors.

The plan, in brief, was a delegation of the powers of the Directors of each corporation separately to the same single third person, reserving only such control over the common agent as the two Boards of Directors when acting together or in concert with each other might see fit to exercise.

Contract, Arts. 1 and 5. Rec. pp. 10 & 11

The powers and functions of the Manager were fixed and defined in the code of rules in these words: "The chief

executive officer of the joint roads shall be entitled the Manager." . . . "It is his duty to act as the agent of the Directors, and as the responsible head of the joint companies, to direct and control their affairs in every department." . . . "He shall have power to employ for the service of the companies all necessary agents or servants."

The possession of both roads and the receipts thereof were to be put, and in fact were put, into the hands of this common Manager, by whom the expenses were to be first paid, and the net earnings were then to be divided, and paid over to the respective treasurers of plaintiff and defendant corporations, the plaintiff treasurer receiving thirty-one per cent and the defendant treasurer receiving sixty-nine per cent of the joint net income.

Contract, Art. 14, Rec. p. 13.

The two corporations agreed upon a certain code of rules for conducting this special agency management by which the Manager was given the selection and appointment of subordinate officers or assistants, including a cashier for the reception and disbursements of the earnings, and a clerk whose duty it was among other things to make up and apportion the net earnings between the roads under the direction of the Manager, in accordance with the provisions of the joint contract.

Rules for Government of Executive Service, Rec. p. 69

At the inception of the contract George Stark was chosen Manager. He continued to occupy that position till March 31, 1875, about eighteen years. He was succeeded by Hoscum Hosford in July, 1875, and Hosford remained Manager till Dec. 1, 1878, when the contract terminated and the special agency management came to an end.

It is recited in the preamble of the contract (Rec. p. 9)

that "said corporations by operating said roads *in common management* would be enabled to do the said business" (passing over the roads of both parties) "with greater facility, greater regularity, and at a great saving of expense to both parties." By Art. 1 of the contract it is provided that each party shall surrender to the "joint management the entire control of their respective roads, shops, depots, furniture, machinery, tools, etc., reserving only to the *separate management* of each corporation such property" (consisting chiefly of real estate) "as is hereinafter specified."

Art. 5 provides that the joint roads shall be operated and managed by one agent . . . chosen by the concurrent vote of a majority of the Directors of each party . . . and "the respective Boards of Directors shall by such concurrent action exercise the same control over the management" (meaning the joint management) "as is usual with boards of railroad directors in ordinary cases."

It will be observed that by this arrangement the management of each road under the common agent was to be participated in equally by the Directors of both, so that neither road was to be controlled, as previously, by its own separate Board of Directors; in other words, the two separate Boards of Directors became superseded or supplanted by this special agent or joint Manager, except so far as they might agree together in exercising control over him.

By Art. 8 of the contract (Rec. p. 12), it was provided "that the roadbed, bridges, superstructure, depots, building and fixtures of each road" (after certain changes should have been made, as set forth in Arts. 6 and 7) "should be kept, as near as may be, in like relative repair from their present state and condition," etc.

By Art. 15, it was provided that the indenture should be construed as a business contract . . . and in no sense

as a lease of one road to the other, or as a union of corporate powers or privileges . . . excepting that . . . the rights and liabilities of one (party) with the other shall be settled and determined by this agreement.

Rec. p. 14

In Art. 14, after fixing the ratio of division of the net earnings, and authorizing each party to make such dividends upon its own stocks, and payable from its own separate funds, as it may deem expedient, these words are added: "it being hereby distinctly provided that the interest upon the debts of either party must also be paid out of *such separate share* and not from *the common fund*."

After the adoption of this traffic contract, and as a means of enabling the two Boards of Directors to act together or in concurrence in exercising the joint supervision over the management contemplated in and by the fifth article of the contract, regular monthly meetings of both Boards of Directors were held at the same time and place in Boston. These monthly meetings were held in common, being attended by the members of both boards, and presided over by the same person who was also for many years at the same time the president and one of the Directors of both corporations. The matters considered and discussed at these joint meetings were such as arose under or related to the administration of the two roads under the traffic contract, and not the affairs and interests of either corporation separately.

Defts' Exhibit, No. 71, XXX., Rec. p. 356 bottom
Bailey's 1st Dep. Ans. 1 to 8, 2d do., 84th Ans. Rec. pp. 75 & 172
Stark's 2d Dep. Ans. 78 to 82, Rec. p. 132.

At these monthly meetings it was the custom of the Manager to make reports to the Directors, and to lay before them for approval any measures (not involving details only) upon which he desired their action or approval, and it was the

constant practice at these meetings to appoint committees consisting of the Manager and of members of both Boards of Directors, the Manager not being at the time a member of either Board of Directors. The Manager was often included as one member of a joint committee appointed by the two Boards of Directors. Three instances of this occurred at the meeting of Nov. 23, 1869.

Stark's 2d Dep. Ans. 173 and 175. Rec. p. 155

At a joint meeting held March 1, 1870, a vote was passed fixing the salary of the president at $2,500 for both roads, payable from the joint funds.

At a joint meeting held Dec. 23, 1873, it was voted that the cashier of the joint roads be authorized and directed to open a deposit account with the National City Bank of Boston.

The Manager was frequently authorized to conclude and execute contracts in writing between the joint roads and other roads conducting business common to them all, and fixing the rates of division of receipts of such business.

At one of the joint meetings, held July 28, 1874, the Man ager was appointed as one of a committee to consider the best manner to bring about a union of the Boston & Lowell and Nashua & Lowell Railroad corporations according to the acts passed by the Legislatures of Massachusetts and New Hampshire.

Rec. p. 342

Before the time limited for consolidation had expired, an attempt was made to get plaintiff committed by written contract to bearing thirty-one per cent of the interest of defendant's debts.

The common president, at meeting of April 23, 1875, called the attention of the board (*i. e.*, both boards) to certain agreements between the two roads as to leased lines and im-

provements which had not been formally reduced to writing, and stated that he held drafts of such contracts drawn by the attorney of the company which he had not been able to examine, and it was voted, that the same be referred to a committee, consisting of the president and Messrs. Stark and Horsford, of the Lowell (*i. e.*, Boston & Lowell) board, and that they be requested to report at the next meeting.

At the next joint meeting this committee made a report and the subject was postponed. This report came up at meeting of June 22, 1875, and was again postponed; it again came up at the meeting of July 27, 1875, when it was laid on the table on motion of one of plaintiff's Directors, and was never afterwards taken up or acted upon.

Rec. pp. 345

Pursuant to the contract and the rules adopted for carrying the same into execution the roads and specific property of both corporations, as also the receipts, tolls and income of both roads, went into the hands of the Manager, to be by him divided, and paid over to the treasurers of the respective corporations as provided by the contract, and they were so divided and paid over by him agreeably to the contract for about fourteen years, and until the defendant corporation became involved in the expense of building a new and costly passenger station at Boston.

During that time the two corporations, in order to enlarge the terminal facilities at Boston, had made purchases together of real estate at Boston, and paid for the same from their separate funds, and had taken deeds thereof running to themselves as tenants in common, the plaintiff contributing thirty-one per cent of the purchase money, and the defendant sixty-nine per cent, and sharing the benefits of such purchases in the same proportions under the contract.

These purchases had been made and the deeds taken by

the two corporations in their separate capacity, and entirely outside of any action whatever on the part of the special agent or Manager, and the two roads in other respects had been maintained in substantially the same relative condition as at the inception of the contract, as provided by Art. 8 of said contract.

Stark's 2d Dep. 178th Ans., Rec. p. 156

Early in 1869, or previously, the Boston & Lowell Company had formed the project of rebuilding and greatly enlarging its old passenger station at Boston, and of uniting with the Eastern Railroad Company in utilizing the new station, when built, for those two roads.

An act of legislation in Massachusetts was obtained for this purpose (May 19, 1869), by which the defendant corporation, either alone or with the Eastern Railroad, was authorized to take a large tract of land in Boston for a station.

At one of the regular monthly meetings of plaintiff and defendant Directors, held Sept. 28, 1869, the Manager submitted plans for the improvement of the terminal facilities of defendant company at Boston (meaning the proposed new station) under the act of the last Legislature authorizing the taking of land, and a committee was appointed with reference to the same.

Defts' Ex. 16, Rec. p. 304

At the joint meeting of Directors, held Nov. 23, 1869, that committee reported, that after a protracted interview with a committee of the Eastern Railroad Directors, they had notified the Eastern Railroad Directors of the intention of the Lowell Railroad Company to proceed to locate under the act for itself alone, unless the Eastern should before that time have signified its intention to join them in the benefits of the act, and the committee recommended that the Lowell Rail-

road Company should proceed at once to locate upon the territory embraced in the act.

Their report was accepted, and the Boston & Lowell Board voted, that Messrs. Crowninshield and Abbott, both being Directors in defendant corporation, be a committee *with the Manager* to prepare a location and report the same for ratification at the next monthly meeting of the board.

Rec. p. 256.

At the next annual meeting of the stockholders of defendant corporation (January, 1870) the Directors recommended that they (defendant's Directors) should be authorized to locate and purchase or take the land (for depot), under the act . . . and to construct suitable buildings and terminal facilities thereon, when satisfactory contracts relating thereto could be concluded with adjacent or connecting roads, meaning thereby either the Eastern Railroad or the so-called upper roads in New Hampshire and Vermont, and not referring at all to plaintiff's road. (This authority was in fact voted by the stockholders of defendant company, Jan. 5, 1870.)

Abbott's Dep. 39th Ans., Rec. p. 90

The defendant Directors failed to secure any satisfactory contract with the Eastern Railroad Company.

At the joint meeting of the two Boards of Directors held Jan. 24, 1871, the Manager submitted and read an estimate of cost of the proposed new station house in Boston, and presented plans of the same.

Cram's Dep. 8th Ans., Rec. p. 66

Prior to Dec. 15, 1871, the train house of the new station had been put under contract, and was well advanced in construction.

Abbott's Dep. 45th Ans., Rec. p. 92.

At a meeting of the Directors of defendant corporation held Jan. 23, 1872, they voted that the Manager should proceed to the erection of the depot building in Boston substantially in accordance with the plans submitted.

Cram's Dep. 9th Ans., Rec. p. 67 top

No such vote as this was passed by the plaintiff's Directors; they did, however, at a meeting held on the same day, appoint a committee of their own number to confer with a committee of the Directors of defendant corporation as to *what interest*, if any, the plaintiff corporation should take in the "new passenger depot in Boston, the Mystic River Railroad, and other property or extensions not embraced in contracts already made between the two corporations."

This committee never made any report, and, so far as appears of record, never took any action whatever on the subject committed to them.

It appears that the defendant corporation had, prior to Dec. 15, 1871, already invested in its Boston improvements $293,758.99, and that the defendant's Directors in their report to the stockholders (of that date) informed them that they had been able to "provide for the increased interest accounts upon investments in the *new works*," and further stated to the stockholders their confident expectation of being able (in future) "to keep up full dividends and meet the interest upon the expenditures now making and to be made for permanent improvements and increased facilities at the Boston terminus."

Abbott's Dep. 45 and 46th Ans., Rec. p. 92.

So far as appears no further action was taken by either Board of Directors in relation to the station or the cost thereof, prior to the twenty-third day of July, 1872, when the usual monthly meeting of the two Boards of Directors with the Manager was held.

Interest on cost of defendant's new depot.

After the efforts of the Boston and Lowell Railroad Company to obtain the co-operation of the Eastern Railroad and its participation in the cost of the new station had failed, and the defendant corporation had already expended (prior to Dec. 15, 1871) in the enterprise nearly $300,000, Manager Stark originated the plan of paying over to the Boston & Lowell Corporation the joint net earnings in his possession as Manager, from time to time at intervals of six months, to an amount sufficient to keep down the interest on the cost of the same, or to refund to defendant corporation all interest charges incurred by it in such construction.

Stark's Dep. 128th Ans., Rec. p. 145
Abbott's Dep. 55th Ans., Rec. p. 97

It appears that this plan was the subject of conversation or discussion between the members of the two Boards of Directors at their joint meetings and was assented or agreed to orally betweed them with entire unanimity.

This oral understanding or agreement, arrived at between the Directors individually, became the subject of formal action for the first time on the twenty-third day of July, 1872.

At that time on the occasion of one of the joint monthly meetings attended by both Boards of Directors and the Manager, they passed a vote in the words and figures following: —

Voted, That the expenditures made and to be made by the Boston & Lowell Railroad Corporation for land and building in Boston for a new station, and the expenditures made and to be made by said corporation for the building and completing the Mystic River Railroad, and for improvements in Winchester for a new station and land for railway purposes, to the amount of $20,000, are to be treated, in the management of the business under the joint business contract existing between said corporation and the Nashua & Lowell Railroad

Corporation as follows, viz.: The said Boston & Lowell Railroad Corporation are to be paid the interest upon such expenditures, made and to be made, at the rate of seven per cent per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract; and the cashier of said two corporations and treasurer of the Boston & Lowell Railroad Corporation is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston & Lowell Railroad Corporation out of the joint receipts of said two corporations.

Previously to the passage of this vote, Manager Stark had been in consultation with Judge Abbott, one of the Directors of defendant corporation, as to some method by which the plaintiff corporation should be made to bear a portion of the interest on the cost of the new station, and the vote above recited was the result of that conference.

Stark's 2d Dep. 116th Ans., Rec. p. 142

The vote itself was framed either by Stark or Abbott, and was by Abbott brought before the joint meeting of July 23, 1872, at which meeting no business was transacted except such as arose under the joint contract.

Plaintiff's Ex. 4, Rec. p. ~~51~~ 53
Stark's 1st Dep. 15th Ans., Rec. p. 56

On July 22, 1872, Judge Abbott had written the Manager requesting him to have the meeting to be held July 23, adjourned from the morning hour to the afternoon, to enable him (Abbott) to be present with the votes prepared by him as to the payments of interest on the improvements of defendant corporation.

Stark's 1st Dep. 15th Ans., Rec. p. 56

Manager Stark himself (the originator of this vote of

July, 1872) understood that no such application of the joint receipts as therein proposed could be lawfully made except by procuring an amendment of the old traffic contract.

Stark's 2d Dep. 156th and 157th Ans., Rec. p. 151

After the passage of this vote, the cashier of the joint management, by direction of the Manager, paid over to the defendant corporation from the joint funds in his hands from time to time during the six and a half succeeding years for interest on the cost of defendant's improvements at Boston the amount in all of $603,884.47, thirty-one per cent of which, $187,204.18, is here attempted to be reclaimed by the plaintiff with interest since date of suit, April 17, 1880.

Bartlett's 1st Dep. 9th and 14th Ans., Rec. p. 73 & 74

Interest to defendant on the cost of its railroad shares.

Soon after the defendant corporation engaged in the project of rebuilding and enlarging its Boston passenger station, it bought up a controlling interest in the capital stock of two other Massachusetts railroads, the Lowell & Lawrence, and the Salem & Lowell, at a total cost of $345,674.

The Manager (Stark) had recommended this purchase to the defendant corporation, and the purchase was made, in 1871, at his suggestion, upon the oral understanding on the part of the plaintiff's Directors (as he states) that the plaintiff corporation should assume thirty-one per cent of the interest on the purchase money, or that the joint funds should be used to pay such interest to defendant company.

Stark's 2d Dep. 75th Ans., Rec. p. 131
Abbott's Dep. 25th Ans., Rec. p. 84
Abbott's Dep. 55th Ans., Rec. p. 97.

No formal action was ever had on this subject at any meet-

ing of the joint boards or of the Directors of plaintiff corporation alone.

The amount of joint funds taken and paid to defendant corporation on this score alone from Oct. 1, 1871, the end of the contract, was in all $95,730.35, thirty-one per cent of which, or $29,676.41, with interest thereon from April 17, 1880, is also reclaimed by the plaintiff in this suit.

Bartlett's Dep. 8th Ans., Rec. p. 72

Manager Stark made or directed the making of these semi-annual payments to defendant corporation, in reimbursement of interest accrued on its debts, until March 31, 1875, when he resigned his position as Manager.

He had begun to pay defendant interest on the cost of its railroad share purchase ($345,674) as early as Oct. 1, 1871, with a payment of $6,017.69, and had continued such payments every six months, and had paid out in that way in all $43,416.25 without any authority, excepting such as the oral assent of the individual Directors of both roads associated with him in the management might afford.

As to the larger payments made to provide for interest accruing on the depot debt of defendant, the Manager by the vote of July 23, 1872, had secured such protection to himself personally as the written assent of said Directors expressed in the form of a vote could afford, whatever that protection might be.

Plaintiff invited to share defendant's interest account.

Soon after Stark ceased to be Manager and shortly before the expiration of the time limited by law for the consolidation of the two roads, an attempt was made on the part of the defendant corporation, or its Directors, to procure the execution by the plaintiff corporation of a formal contract

by which the plaintiff company should agree to bear thirty-one per cent of all interest charges incurred by defendant, both in its purchase of the railroad shares and in making its Boston improvements. The inducement or consideration held out to plaintiff for making such a contract was the proposed offer of defendant corporation in the same contract to bear sixty-nine per cent of the interest assumed by plaintiff in building its new freight house at Lowell at a total cost of $102,186.24.

Bailey's 2d Dep. 95th Ans., Rec. pp. 176.

In this proposed new contract it is recited that plaintiff had, since the inception of contract, rebuilt its freight station at Lowell, at a cost of $102,186.24, and that defendant corporation had taken land and rebuilt and enlarged its Boston passenger station and its Winchester passenger station, and had invested $345,674 in the stock of other railroads, and made other improvements of its railroad property (all at a total cost or expense of $1,836,410.38), and it (the proposed contract) provided that in the current settlements under the said contract of 1857, and during the term of said contract, the defendant corporation should assume and account for sixty-nine per cent of the interest on the cost of the plaintiff's new freight house, and that the plaintiff corporation should assume and account to defendant for thirty-one per cent of the interest on the cost of each and all of its said improvements at Boston and railroad share purchase.

The plaintiff had made an outlay upon its property of $102,186.24. The entire annual interest upon this outlay, reckoned at six per cent, would be only $6,131.17. By the proposed new contract for embodying alleged oral understandings never reduced to writing, the Boston & Lowell Corporation offered to assume and pay to plaintiff sixty-nine per cent of this yearly interest during the contract, and

asked the plaintiff corporation in return for this to assume thirty-one per cent of the interest upon the cost of the defendant's improvements.

Operation of proposed interest contract on plaintiff.

It should be observed in this connection, that by the terms of this proposed contract, which the plaintiff corporation was asked by Directors of Boston & Lowell Corporation, in their joint meetings held under the management, to adopt and subscribe, the plaintiff would have been committed in writing not only to an observance of the provisions of the vote of July 23, 1872, but to the adoption or ratification of the course of the Manager (Stark) in paying interest to the defendant from the joint funds on the additional amount of $345,674 previously invested in the share purchase, the principal of all such sums expended by the defendant amounting to $1,836,410.38, or two and a quarter times the amount of the plaintiff corporation's whole capital stock. In consideration for this act requested of plaintiff, the plaintiff was to receive from defendant sixty-nine per cent of its interest on $102,186.24 only; in brief, the plaintiff, in consideration of the receipt from defendant yearly of $4,230.45, was to become liable to defendant yearly for $34,157.22, *i. e.*, plaintiff was to pay defendant $29,927 more than it was to receive from the defendant. This reduction of plaintiff's share of the net earnings by the sum of $30,000 per annum taken therefrom by the Manager, as supervised by the two boards, and bestowed on the defendant corporation under the vote of July, 1872, very soon resulted in depriving the stockholders of plaintiff corporation of all dividends whatever.

Exhibit Lovering 43d Rept., Rec. p. 290

Change of plaintiff's directors, 1877, and results thereof.

This state of things led to an overturn in the old Board of Directors of plaintiff company at the annual meeting held in May, 1877, and to instructions being given by the stockholders to the new Directors to make investigation as to the methods of administering the affairs of the two roads under the contract.

Lovering's Dep. 14th Ans., Rec. p. 185.

This investigation was made by the plaintiff's new Directors. The existence of the vote of July, 1872, was then brought to light or to the knowledge of those new Directors for the first time, and they thereupon, on the 25th of June, 1877, passed a vote to rescind the vote of July, 1872, and gave notice of such rescission to the defendant's Directors.

Plaintiff's Ex. 8, Rec. pp. 61–63.
Bailey's 1st Dep. 3d Ans., Rec. p. 75.
Abbott's Dep. 56th Ans., Rec. p. 97.

No notice whatever was taken by the defendant's Directors or by Manager Hosford of this vote of plaintiff's Directors rescinding the so-called vote of July, 1872.

Abbott's Dep. 56th Ans., Rec. p. 97.

At the next annual meeting of plaintiff corporation, May 1878, the plaintiff's Directors made a full report of the situation of affairs between the two roads, setting forth how they had become informed for the first time of the existence of the so-called vote of July 23, 1872, and of the vote they had passed June 25, 1877, for rescinding said vote of July, 1872, and the further fact that the Manager (Hosford) had continued to make the interest payments to defendant cor-

poration after their vote of June, 1877, and that defendant's Directors had refused to take any notice of the remonstrances of the plaintiff's Directors against the Manager's course in this respect.

Complainant's Exhibit Lovering, Rec. pp. 290–293.

Upon the presentation of this report the stockholders of plaintiff company passed a vote instructing the Directors to take proper measures for recovering the share of plaintiff in sums so passed over to the defendant corporation by the two Managers from the joint fund.

Dep. Lovering, 15th Ans., Rec. p. 186, top.

Although this proposed contract for committing the plaintiff corporation to a contribution from its share of the joint funds to payment of interest on the $1,836,410 (expended by defendant in its own investments or improvements) was repeatedly brought before the joint meetings of the Directors held in the summer of 1872, as above stated, it was not acceded to by the Directors of plaintiff corporation or any of them so far as appears from the record of the joint meetings. Notwithstanding this fact, however, the payments of interest to defendant were continued by the Manager to the end of the contract, in defiance of the vote passed by plaintiff's new Board of Directors, June 25, 1877, for preventing such payments. Manager Hosford persisted in this course after June, 1877, with full knowledge that the plaintiff corporation deemed it to be in plain violation of its rights under the contract.

It was the course of business for the managing agent to make a division of the net earnings in his hands between the

two corporations semi-annually, by making drafts upon the cashier Bartlett therefor, payable to the respective treasurers of the corporations. A sample of these drafts is printed at p. 207 of the record, top.

Rec. p. 72, Bartlett's 1st Dep. 6th and 7th Ans.
Rec. p. 206, Bartlett's 2d Dep. 40th and 41st Ans.

From and after Nov. 7, 1872, the managing agent was regularly debited by defendant corporation in account for the items of interest accruing on its investments in railroad shares and improvements, at intervals of six months, and these interest charges were thereafter deducted by the Manager from the net earnings in his hands, before making up the balance (or 31 per cent) of such net earnings to be paid over to the treasurer of plaintiff corporation.

Rec. pp. 195 and following.

The entire amount of such interest charges was then paid over by the Manager to the defendant corporation.

Rec. p. 22, Sect. 17 of Deft. Co.'s Ans.

The plaintiff was unable to make Manager Stark a party defendant to its bill, because of his residing in a different judicial district from the other defendants.

The plaintiff seeks to establish the liability to it of both defendants upon the ground that the managing agents, being from time to time in the receipt and possession or control of the entire net income of both roads under the pooling contract, failed to distribute the same pursuant to the fourteenth article of the contract (Rec. p. 13), but made deductions therefrom of sums amounting in all to $699,614.76, and applied the same in reimbursing the defendant corporation all the interest accrued and accruing upon its invest-

ments in the improvement of its own property in or near Boston, say $603,884 41

and in the purchase of shares in other railroads, say 95,730 35

$699,614 76

the effect of which doings of the two Managers was to deprive the plaintiff of 31 per cent of the sums so deducted, viz., $216,880.57, which it would have received (more than it did receive) had the Managers made division of said net earnings in the ratio fixed by the pooling contract.

The liability of the defendant corporation arises as is charged from the fact that it received these sums at the hands of the two Managers in excess of its proper share of the net earnings.

The liability of Manager Hosford's estate arises, as is charged, from the fact that in passing over these sums to the defendant Company, he was violating the trust attached to or impressed upon thirty-one per cent thereof as the sole property of the plaintiff, unless it is made to appear that this thirty-one per cent of the fund had been freed and discharged of the trust by reason of some modification of the terms of the pooling contract relating to the division of the income.

Rec. p. 54, 55, Stark's Dep. Ans. 3d to 8th.

Defence as set forth in answer of defendant corporation.

The defendant corporation admitted in its answer the receipt by it through the cashier, Bartlett (but not through Stark or Hosford), of all the sums claimed by plaintiff (Rec. p. 24, Sect. 27), and based its defence upon the ground that it was entitled to the same, either in pursuance of the pooling

contract itself, or because of certain subsidiary or additional contracts subsequently engrafted thereon by the two corporations, as was alleged, the subsidiary or additional contracts so referred to being (as we understand) certain agreements said to have been arrived at *orally* between the individual members of the two Boards of Directors, though not evidenced by any formal action of said Directors committed to writing or made matter of record in any way.

Rec. pp. 22, 23, Ans. of B. & L. R. Co. §§ 17, 19, 20.

Another defence was set up by both defendants in their answer, viz., that plaintiff's claims in suit had been submitted to arbitration, and that the arbitrators had made an award adversely to such claims and in favor of defendant corporation.

As this defence was met by the plaintiff with evidence of an adjudication to the effect that the power of the arbitrators had been revoked by plaintiff before award made, and as the alleged award did not enter into the decision of the court below, we do not deem it necessary to notice it further.

The defence first mentioned was sustained, and the court below held that, either independently of the traffic contract or as supplementary thereto (Rec. p. 410, near bottom), and by reason of certain oral agreements made by the plaintiff's directors, or imputed to them by the judge, the plaintiff had become bound and concluded as to the several payments of interest taken out of the net earnings and paid over to defendant company.

The issue so raised by the pleadings and treated by the court below as the basis of its decision in favor of defendants was, *Whether the plaintiff corporation did become lawfully bound to bear or contribute thirty-one per cent of the amount of all defendant corporation's interest charges, or any part thereof, during the entire term of the pooling contract by reason of the oral agreements or understandings to that effect between the Directors of the two contracting corporations.* If so, then

the decision of the court below was correct; if not so, then that decision was certainly wrong as to that part of the amount taken from the plaintiff's quota of the net earnings and devoted by the Managers to the payment of interest upon the investment of defendant corporation in certain railroad shares ($29,676.41), because these particular payments were never sanctioned by any vote or other formal action of the Directors of either of said corporations.

Although the single issue presented by the pleadings and sustained by the court below (as shown by its opinion) related to the validity of the oral contracts said to have existed between the two Boards of Directors, and although, if that issue was decided wrongly, the plaintiff would be and is entitled to recover a part at least of the amount claimed by it, viz., $29,676.41, yet the defendant corporation below did take the ground as to the other and larger claim of the plaintiff to thirty-one per cent of the amount of all interest paid it on the cost of its Boston improvement (viz., $187,204.18), that it was entitled to the same under or by virtue of the vote of July 23, 1872, and this point will be referred to by us later on in this brief.

By the traffic and pooling contract first entered upon in 1857 for a term of three years, and afterward, in 1858, adopted by the stockholders, and by them extended for a term of twenty years, the two railroads and the receipts or earnings thereof were taken out of the Directors' hands, and placed in the possession and control of a common managing agent, the ordinary functions of the Directors as general managing agents (so far at least as the provisions of the contract extended) were suspended, and the special agency or control of a single person substituted in their place.

This substitution was complete and exclusive, at least as to all matters expressly provided for in and by the terms of the contract itself, since otherwise there would have been, not only a special agency management of both these railroads reposed in one person (not being a director at all), but also a general agency management of each by a Board of Directors

elected by the stockholders, and such a state of things would of course have resulted in utter confusion and conflict.

The single managing agents employed under this contract cannot be deemed the mere agent or representative of the Directors, since the law would not permit directors of corporations to delegate to others the exercise of their usual powers in any matters involving discretion. — 1 Wood's Railway Law, p. 406, § 154.

But as to such matters as were not clearly provided for by the traffic contract this special agent was not left to the free exercise of his own discretion alone, but was subjected to the supervision and control of both Boards of Directors when acting together or in concurrence with each other, but not to the control of either Board of Directors when acting separately or alone.

Rec., p. 11, Art. 5.

With these qualifications the single and special managing agent was by the contract and the rules adopted for its execution substituted for or in place of the Directors themselves (in each corporation), and put forward as the . . . head of the joint companies to direct and control their affairs in every department.

Rec. p. 69, Middle, Rules Ex. Service.

By the terms of the contract (as understood by us) each corporation contributed its railroad or plant, in its then existing condition, including all stations, buildings and fixtures pertaining thereto, and the receipts or earnings to be derived therefrom, and placed the same in the hands of this special agent or manager. He was to pay over to the treasurer of each corporation the balance or net earnings of the two roads semi-annually in the ratio of thirty-one per cent

thereof to the plaintiff's treasurer, and sixty-nine per cent to the defendant corporation's treasurer.

Rec. pp. 12, 13, Arts. 8 and 14.

This ratio of division of the net earnings was (as we understand) predicated upon the relative earning capacity of each road in the condition in which it was at the inception of the contract.

It was not confided to the discretion of the managing agent either alone or with the concurrence of the two Boards of Directors, or either of them, to make any modification whatever in the terms of this traffic or pooling contract, the execution of which had been committed or entrusted to him by the two corporations acting through their stockholders respectively.

LAW.

I.

In order to eliminate from this case a question which might, possibly, be made the basis of a decision adverse to the plaintiff in the case, we propose to take up this question as a preliminary one in the first place, namely, the question whether, *consistently with the terms and provisions of the twenty years' traffic contract as originally framed*, the special agent or manager, either alone or with the concurrence and support of the two Boards of Directors, was at liberty to take the net earnings or receipts of the two roads remaining in his hands at any time undivided, and devote or appropriate the same, or any part thereof, to the payment of interest of debts of the defendant corporation incurred in making improvements of its own property or plant, or in the purchasing of outside property for investment.

We think this question must be answered in the negative.

It is expressly provided by the fourteenth article of the contract (Rec. p. 13, bottom) that interest upon the debts of either party must be paid out of the separate share of such party and not from or out of the common fund.

By the eighth article of the contract (Rec. p. 12) it is provided that the relative condition or state of repair of the two roads should be maintained the same as at the inception of the contract, "as near as may be," so that neither party should be a gainer by the use of the joint funds upon its own road, even by way of repairs.

By Article 15 (Rec. p. 14, top) of the contract, it is declared in terms to be a business or traffic contract only, and not a union of the corporate powers or privileges of the two companies. Under these circumstances it is not likely to be claimed that the managing agent had any such power

unless it can be found under that clause (Art. 14) of the contracts which provides that income and expense accounts shall be made up monthly and kept and accurately closed and balanced from time to time semi-annually, under which clause it was the duty of the managing agent to cause these accounts to be so made up and balanced; and, therefore, it was necessarily left to him to determine, in the first instance, which of the sums actually disbursed in the course of the business should go to make up the account of operating expenses.

The above inquiry seems then to be resolved into another, viz.: Whether the manager, under his conceded authority to determine, in the first instance, the manner of making up the income and expense accounts, could consistently with the contract and with his duty to the plaintiff under the same be permitted to apply any portion of the joint earnings remaining undivided in his hands to reimburse the defendant company the amount of interest paid or incurred upon its debts, and justify this proceeding by calling such interest money operating expenses arising under the contract?

While we concede it was within the legitimate province of the manager under the contract, not only to make up the expense account of both roads, but to set aside and devote a sufficient amount of such earnings to pay and discharge all legitimate expenses of operating the two roads, we deny that in the exercise of this power the Manager could properly use the joint earnings or any part of them in providing for the debts of one of the parties or the interest thereon, and justify himself to the other party in so doing, and we think it hardly probable that any such position as this will be taken.

The cashier, Bartlett, being an experienced railroad ac-

countant, and also the treasurer of defendant corporation at the time, and the very same person who was directed to make up this interest account and pay the amount of the same over to the defendant corporation as making or constituting a part of the expenses of operating the two roads under the contract, being under examination as a witness in this case, was asked whether in his judgment such expenditures as defendant corporation had made on its new station could be properly regarded or treated as expenses of operating the defendant's railroad. His answer was, "No, sir."

Bartlett's 1st Dep. 16th Ans., Rec. p. 74.

We are however, under no necessity of arguing at this late day, whether the interest of debts incurred in constructing a railroad makes any part of the expense of operating the road when constructed.

This very question, as also the meaning of the term "operating expenses," have been the subject of legal investigation and have been settled by this court; and it has been determined that expenses incurred in original construction or subsequent enlargement and improvement of the corporation plant, belong to "capital" account and cannot be properly classified as "expense" account.

Union Pac. R. R. *v.* U. S., 99 U. S. 402.

In delivering the opinion of the Court in this case, Bradley, J., said: —

"As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in

operating the works and keeping them in good condition and repair; while expenses chargeable to capital include those incurred in the original construction of the works and in the subsequent enlargement and improvement thereof."

II.

While it may not be claimed by defendants that the Manager in the legitimate exercise of his function of making up the expense accounts of the two roads, could convert the interest charges of either party into expenses incurred by himself (the manager) in operating the two roads, by simply declaring them to be so, yet it will probably be contended that the Manager was fully authorized to do this very thing in this case to the extent of the interest arising from the cost of defendant's Boston improvements ($603,884.47), by the vote of the two Boards of Directors passed at their joint meeting held July 23, 1872.

To this position (if taken) we reply that the two Boards of Directors could have no greater power than the Manager himself to override in any way the provisions of the traffic contract then in process of execution, nor could they confer any power on the Manager alone to do this. It was unquestionably the province and duty of the Manager to make up the expense account, justly and truly according to the facts, and, after meeting all proper operating expenses, to divide the balance or net earnings between the two contracting parties in the manner fixed and determined by the contract itself.

The money remaining to be divided was in the hands of the Manager or his subordinate and appointee (the cashier), and not in the hands or possession of the Directors, and as the Directors had no physical possession or control over this money, they were under no accountability therefor to either party. This accountability attached to the Manager alone.

Again, as to so much of this interest money as was paid over to the defendant corporation by or through Manager Hosford (he being at the time both a director and large stockholder of the defendant company), Rec. page 16, Ans. Hosford's Executors, near top), and at the same time bound as trustee to protect the interest of his *cestui que trust* (the plaintiff) to the extent of its interest in this fund, we submit that his (Hosford's) executors cannot now be permitted to set up the defendant's interest claim or any adverse claim whatever, and especially that he (Hosford) should not be permitted to use his position as trustee of the plaintiff to promote in the slightest degree his own personal interest as a large shareholder in the defendant corporation.

Morrison *v.* Caldwell, 5 Mon. 435.
Lewin on Trusts (8th Eng. ed.), 285.
Underhill on Trusts, p. 126, Art. 41.

III.

If, however, our position in this respect is untenable, and it was within the lawful power of the two Boards of Directors, when acting in concert, to direct the Manager to treat interest on defendant's debts as constituting operating expenses, and to justify him in using the joint funds in that way as against the plaintiff corporation, yet after a time (June 25, 1877) the Manager ceased to have the authority of these two Boards of Directors for making such interest payments, and thereupon, as we submit, became personally accountable to the plaintiff for thirty-one per cent of all the joint earnings thereafter taken and used by him in that way.

Immediately after the discovery, made by the new Board of plaintiff's Directors (elected in May 1877), of the existence of the vote of July 23, 1872, this new Board proceeded at once by its own vote to pronounce the former vote null and void and to rescind it altogether.

Rec. p. 63, top; plff's Directors' vote of June 25, 1877.

Due notice of the action so taken by plaintiff's new Directors was given to the defendant.

Rec. p. 75, Bailey's Dep. 3d and 4th Ans.
Rec. p. 97, Abbott's Dep. 56th Ans.

Notwithstanding this rescission and repudiation by the plaintiff's Directors, June 25, 1877, of the joint vote of July 23, 1872, Manager Hosford paid no attention to it, but continued to make the interest payments to defendant corporation as before, and subsequently disbursed to defendant company, for interest on Boston improvements alone, the amount in all of $169,154.40, of which amount thirty-one per cent, or $52,437.86, belonged wholly to the plaintiff, according to the contract ratio of division; and for this sum at least $52,437.86 (as we submit), the executors of Hosford must be held liable in this case, unless it shall be found by this court, (as it was apparently by the court below), that Hosford was relieved from all liability whatever to the plaintiff, by reason of the oral agreements or contracts as to all these interest payments concluded between the two Boards of Directors before July 23, 1872; and unless this court shall also find that these alleged oral agreements or contracts continued in force or operation during the whole term of the traffic contract, so that the new Board of plaintiff's Directors, elected in May, 1877, were unable to put a stop to such payments.

IV.

We now recur to the main question upon which the decision of the court below appears to have turned, viz., the question, whether the interest payments of $699,614.76, to the defendant corporation during the term of the joint traffic contract were lawfully authorized by reason of the alleged

subsidiary or additional contracts or arrangements referred to by defendant corporation in the 17th section of its answer in this case?

Rec. p. 22.

The subsidiary or additional contracts so referred to in the 17th section of answer are fully set forth in the 19th and 20th sections of said answer, the 19th section relating wholly to the interest paid defendant company on its investment in railroad shares ($95,730.35), and the 20th section relating wholly to interest paid on the cost of the improvements made at or near Boston ($603,884.47).

As to the first of these interest payments ($95,730.35), the statement of the defendant in its answer (Sect. 19) was as follows: —

"In 1872, it was deemed necessary for protection of the joint business and interests of the parties to the traffic contract to obtain control of the Salem & Lowell and the Lowell & Lawrence Railroads, and it was thereupon agreed between said parties, that if the Boston & Lowell Railroad Corporation would buy a majority of the stock in said companies that it should be paid seven per cent (semi-annually) upon the money used for the purchase of said shares during the continuance of the contract. With the full knowledge and consent of the other party to the contract, the Boston & Lowell Railroad Corporation thereupon bought a majority of the shares of stock of the two companies aforesaid, and paid therefor the sum of $345,674, and interest upon said sum was thereafter paid to the said Boston & Lowell Railroad Corporation with the full knowledge and consent of the second party (*i. e.*, party of the second part to joint traffic contract and plaintiff in this case) until the termination of said contract."

It is not claimed by defendant, and is not true, that any of the agreements here referred to were ever put in writing, or signed by either party, or by any one claiming to represent them; on the other hand it is conceded that such agreements became operative and binding upon the plaintiff corporation, if at all, by reason of the fact that the Directors for the time being of the plaintiff corporation while the Manager was engaged in carrying the contract into execution, in their oral conferences with the Directors of defendant corporation at their joint meetings, had orally given their unanimous consent to the making of such interest payments.

The plaintiff does not deny that such oral agreements or assents were had and exchanged between the several persons comprising the members of the two Boards of Directors.

The plaintiff does, however, deny that any such oral agreements were had or made previously to the purchase by the defendant corporation of the railroad shares in question, or that such purchase was made in consequence of such previous oral agreement of the plaintiff's Directors that the plaintiff corporation would share or participate in the interest reckoned at seven per cent upon the price or cost of said purchase, or that there is any evidence to that effect in the case. On the contrary it does appear in evidence that neither the Directors of the Boston & Lowell Railroad Corporation nor that corporation itself were authorized by law to purchase these shares. The evidence also shows that these shares were purchased prior to Sept. 30, 1871, although it is stated in the foregoing extract from defendant's answer that the shares were purchased some time in 1872.

Rec. pp. 94, 95, Abbott's Dep., Ans. 49, 50 and 51.

There was so much doubt as to the lawful right of the Boston & Lowell Railroad Company to become a pur-

chaser of this stock, that it was not deemed prudent to take title thereto in its own name but in the name of certain individuals as trustees for the corporation.

Rec. p. 95, Abbott's Dep., 50th Ans.

At the time of defendant's purchase of the railroad shares, and for thirteen years or more previously, the Salem & Lowell and Lowell & Lawrence Railroads had been under lease to the defendant corporation, and had been taken into the joint account, and operated by the Manager under the traffic contract, the net earnings being pooled or divided between them in the same ratio as were the earnings of their own respective railroads. This gave the plaintiff corporation all the benefits that could possibly arise from the ownership by defendant corporation of a controlling interest in the capital stock of these two leased roads, since the lease under which these two roads were held and operated by the Manager was to continue as long as the joint traffic contract itself, viz., for twenty years from Oct. 1, 1858.

Bartlett's 2d Dep. Ans. 132–5, Rec. p. 221.

Under these circumstances we submit, that the interest payments made from the joint funds to defendant corporation upon the price or cost of the railroad shares were not legally authorized or justified by the subsidiary or additional *oral* contracts said to have been made by plaintiff's Directors to that effect. In support of this position, we offer the reasons following: —

1. The Directors of the two corporations, while sitting and conferring together as to the proper mode of carrying into execution the joint traffic contract, were not acting or entitled to act as the lawful representatives of either corporation as to any matters of business regulated by, or within the scope of the contract.

2. If the Directors respectively of each corporation, while sitting together at these joint meetings, might properly take action upon or with reference to the separate affairs and interests of the two companies lying outside of the contract, yet we submit that they could only do so effectively by some instrument reduced to writing and signed, or put in the form of a vote passed or adopted by them so that their respective principals or constituents might have some evidence of their proceedings and some means of understanding their own rights in the premises. The executory agreements of corporate directors, made orally and not committed to writing by vote or otherwise, do not subject the corporate body itself to any liabilities whatever.

Edgerly *v.* Emerson, 23 N. H. 568.
Schuman *v* Seymour, 24 N. J. (Eq.) 153.
Stoystown Turnpipe Co. *v.* Craner, 45 Pa. St. 386.
Cammeyer *v.* Churches, 2 Sand. Chan. 229.
Ditrey *v.* Lamar R. Co., 4 Hurl. & C. 463.
Ross *v.* Crockett, 14 Louis. An. 811.
Young *v.* Blackhawk Co., 66 Iowa, 460.
Johnson *v.* The City, 5 Phila. Rep. 445.

3. Again in order that these oral agreements of the plaintiff's Directors should become binding upon the corporation as its own contract, it was necessary that they should have been based upon some consideration valid in law. Such consideration appears to have been wanting in the case of these oral agreements on the part of the plaintiff's Directors.

If at the time of the alleged contract with defendant's Directors, that corporation had not purchased the railroad shares and had no legal right to acquire them by purchase, then its proposal or offer to make the purchase would not constitute, of itself alone, a consideration suffi-

cient in law to support a promise on the part of plaintiff's Directors to contribute any sum whatever in aid of such purchase.

Again, if at the time of the allegedcontract of plaintiff's Directors to contribute to these interest payments, the defendant had already become the owner of said shares, and if the defendant was to remain and did remain the sole owner of the shares, then the plaintiff derived no pecuniary benefit whatever from the defendant's purchase, and the supposed promise of the plaintiff's Directors to bear a portion of the cost or price paid for the shares, or of the interest thereon, was wholly gratuitous and so not enforceable in law.

Cottage St. Church *v.* Kendall, 121 Mass. 528.
Burke *v.* Smith, 16 Wall. 395 (remarks near top).

4. But whether the foregoing reasons assigned by us are sound or not is of no importance, since it was clearly beyond the legal power or capacity of the plaintiff's Directors to bind the corporation by contract in any way to contribute to the payment of interest upon the cost of the shares purchased by defendant, because it would not have been competent in law for the plaintiff corporation to have entered into a contract with the defendant corporation for that purpose under any conceivable form.

Pearson *v.* Concord R. R., 12 Am. & E. R. R. cases, 102.
Allerton *v.* Railroad, 18 Wall. 234.
Thomas *v.* Railroad, 101 U. S. R. 71.
Davis *v.* Old Colony R. R., 131 Mass. 225.
Milbank *v.* N. Y. & N. E. R. Co., 64 How. 20.
Penn. R. R. *v.* St. L. A. & T. H. R., 118 U. S. 290.
Mallory *v.* Han. Oil Works, 86 Tenn. (2 Pickle), or 4 R. R. & Corp. L. J. 202.

Some of the cases just cited were referred to by the court below in its opinion, (Rec. p. 410, near bottom) as merely limiting the power of directors to the ordinary business transactions of corporate bodies. That court did not seem to perceive that the cases cited apply to the corporate bodies themselves as well as to the directors, and are therefore decisive of the case at bar, unless it is true, as held by the court below, that agreements by one corporation to assume and pay interest on the debts of another corporation belong to and fall within the ordinary business transactions of corporations.

Rec. p. 410, bottom.

There is, however, this difference in the grounds of defence to the claim to recover for the interest of the railroad share purchase (in 19th section of the answer), and the grounds of defence to the claim for interest paid on Boston improvements. As to the latter claim the defendant corporation relies not only on the alleged oral agreements of the Directors, but also "upon the vote of the Directors of the Nashua & Lowell Railroad Corporation" (meaning the vote of July 23, 1872) as constituting in itself an agreement. The statement in this respect is that large sums of money were expended by defendant corporation on the Boston improvements in reliance upon receiving such interest from the plaintiff, meaning, as we suppose, to take the point that the vote itself furnished the inducement to defendant company to make the outlay in question, and therefore affords a legal consideration to support the promise (if any) on the part of the plaintiff, said to be contained or embodied in the vote.

V.

The cases just cited by us to show that the alleged agreements of plaintiff's Directors afford no defence to plaintiff's claim to recover the amount taken from it by the Manager in paying interest to the defendant company on the purchase money of the railroad shares, also show that plaintiff's Directors were not any more competent to dispose of plaintiff's money in paying interest upon the cost of improvements of property of the defendant corporation at Boston, (the sums so taken from plaintiff in this way aggregating to $187,156.30.)

Hence these cited cases would, we submit, be decisive as to the entire amount in controversy in this suit, if the defendant had no other answer thereto, than that made to the plaintiff's recovering the items of interest paid defendant corporation on account of railroad share investment as set forth in the 19th section of its answer and that set forth in the 20th section of its answer relating to the Boston improvements; the latter setting up the vote of July, 1872, as operating to induce defendant company to build the new station at Boston.

If the Directors had made these interest agreements both orally and in writing they would not (as we understand) be any legal answer to the plaintiff's position that all the alleged contracts or agreements so set up were *ultra vires*, not only as to the Directors, but as to the plaintiff corporation itself, and consequently void.

Let us, however, inquire whether it is true in fact that the sums of money expended by defendant on its Boston improvements were expended by it in reliance upon the vote of July, 1872, as stated in the latter portion of Sect. 20 of the defendant's answer.

Rec. p. 23.

At a joint Directors' meeting held Sept. 28, 1869, the Manager submitted plans for the improvement of the terminal facilities at Boston, . . . and a committee was appointed in reference to the same.

Rec. p. 304.

At the next monthly meeting held Nov. 23, 1869, the committee made a report; that report was accepted and another committee appointed to prepare a location and report the same for ratification at the next monthly meeting of the Board.

Rec. p. 256.

At the monthly meeting held Jan. 24, 1871, the Manager submitted and read an estimate of the cost of the proposed new station house in Boston, and presented plans of the same.

Rec. p. 306, bottom.

At a meeting of the Directors of the Boston & Lowell Railroad Company held Jan. 23, 1872, the record is as follows: The Manager submitted plans and drawings of the contemplated depot building in Boston, when it was voted that the Manager proceed to the erection of the same substantially in accordance with the plans submitted.

Rec. p. 67, top, Cram's Dep. 9th Ans.

By this last vote of the Directors of the defendant corporation, the Manager was instructed to proceed with the erection of the new passenger station six months before the passage of the vote of July 23, 1872, and it appears that the defendant corporation had expended on that work, prior to Nov. 7, 1872, as much as $656,621.09.

Rec. p. 195, 10th line from bottom.

The Directors of defendant corporation, in their annual report to its stockholders for the year 1871 under date of Dec 15, 1871, stated as follows: "We have been enabled to make the usual *dividends, to provide for the increased interest accounts upon investments in the new works*, and to carry to the sinking fund and surplus account the accustomed balances. The steady annual increase of receipts would seem to warrant our confident expectation of being able to keep up full dividends, and *meet the interest upon the expenditures now making and to be made for permanent improvements and increased facilities at the Boston terminus.*"

Rec. p. 92, Abbott's Dep. 46th Ans.

It also appeared from the same report that $293,758.99 had been expended by the defendant company in its Boston improvements prior to Sept. 30, 1871.

Rec. p. 92, middle.

It thus appears to be clearly proved, as we submit, that the Boston improvements were undertaken and proceeded with for a considerable period of time before the passage of the vote of July 23, 1872, and consequently that that vote itself did not operate to induce the defendant corporation to enter upon that particular expenditure. About one half of the cost of the entire structure had been expended before the date of the vote.

It must therefore be seen that the vote of July 23, 1872, even if regarded as a promise by plaintiff's Directors that the plaintiff corporation should contribute to the payments of interest on Boston improvements could not operate as a valid contract to that effect, because, if a promise at all, it was a gratutitous one, not capable of enforcement at law.

There are, however, several other reasons why the vote of July, 1872, cannot be treated as a contract as between the two Boards of Directors by whom the same was passed.

Firstly, it does not purport to be a contract it contains no agreement for the doing of anything by one party to or for the benefit of another party; it purports to make an appropriation of a fund owned in common or by both corporations in aid or for the benefit of one of them, and not an appropriation of the money of one only for any purpose, and the money appropriated was not at the time in the possession or control of either corporation, but in the control of the common agent of both and already bound by a prior and different appropriation.

The apparent object of the vote itself was to give to the Manager the concurrent permission of the two Boards of Directors to use the joint funds in his hands for the sole benefit of one of the two corporations, and the vote might perhaps have had that effect, if it were possible for the Manager to make such a use of the joint funds in his hands consistently with the terms of the traffic contract, with the execution of which he was charged, and himself bound to observe or conform to.

There is also evidence in the case, circumstantial in character, which tends strongly to show that it was not intended by the plaintiff's Directors to contract for the payment of the interest money in question, or part of it, from or out of the proper funds of the plaintiff, for these Directors were solicited in the spring of 1875 to consent to putting this same proposition in the form of a written contract between the two corporations, and they declined it. (See above, pages 14, 15, and 16 of this brief.)

Again, if the vote of July, 1872, had been regarded in 1875 as an existing contract between the parties, there would

have been no occasion for a second contract of the same character.

VI.

The court below, after having discussed at much length what it called the main question (Rec. p. 410), namely, "whether the Directors in law could (and in fact did) bind the plaintiff corporation in respect to the transactions complained of" and after having determined it in the affirmative, then proceeded to observe: "Aside from this there is much evidence going to prove that the stockholders ratified the acts of the Directors. We are aware that this is disputed by the plaintiff, largely on the ground of the manner in which the accounts were kept. Upon the whole, we think the evidence goes to show such an acquiescence on the part of the stockholders (plaintiff) as forbids them after this lapse of time from holding the defendant liable."

If it were true, as was found or assumed by the judge in this decision, that the plaintiff's Directors had power to commit that corporation to liability for the payment of a portion of the interest on the cost or value of property belonging solely to the defendant company, and if they in fact had done this, then such liability had become thereby charged upon the plaintiff corporation, and it was quite unnecessary for the court to consider whether the plaintiff's stockholders had known of or had ratified such acts or doings of their Directors; if, on the other hand, the Directors had no such power, (as we have attempted to show), then nothing of this sort had been lawfully done by them in their agency capacity, and there was nothing for the stockholders to ratify.

Hence we do not perceive how this part of the opinion of the Court adds any force whatever to what had been previously stated as the conclusion of the Court upon the main question. If, however, this Court should be of a different

opinion upon this point, then we desire to state that we know of no evidence whatever in the case going to show that any considerable number of the plaintiff's stockholders (apart from the Directors themselves), prior to May 1877, were informed or made aware of the fact that the defendant corporation had ever been in the receipt (from the joint net earnings) of interest on its investment in railroad shares; and we venture to assert that there is no competent and sufficient evidence in the case that any considerable number of the stockholders had, prior to May, 1877, been informed of the use made of the joint funds in paying to defendant corporation its interest upon the cost of its Boston improvements.

The facts on this subject are fully set forth in the Forty-third Annual Report of the plaintiff's Directors to the stockholders for the year ending May 29, 1878, being complainant's Exhibit Lovering, printed at p. 290 of the record in this case. In this report (Rec. p. 171, middle) is found the statement that some of the plaintiff's new Directors (elected in May, 1877) were then entirely ignorant of the existence of the vote of July 23, 1872, and remained so until they had become Directors and had entered upon an investigation of the subject, as instructed to do by vote of the stockholders passed in May, 1877.

At the same annual meeting of the stockholders of plaintiff company at which the forty-third annual report was presented, a vote was passed by the stockholders in which they (the stockholders) declared that they had on that day learned for the first time of the existence of the vote of July, 1872, and of the fact of moneys having been taken from the joint funds and used for the sole benefit of the defendant corporation under that vote.

Rec. p. 186, top.

This very vote was copied and set forth in full in the opinion delivered by the court below.

Rec. p. 409, near bottom.

In view of all this, we are at a loss to understand how the judge below could have found and stated, as he did, that the evidence in the case showed such an acquiescence in these payments to defendant on the part of plaintiff's stockholders as to forbid them (meaning to estop them) from holding the defendant liable.

The judge below must have overlooked or forgotten that part of this vote of the stockholders in which they requested the Directors to take proper measures for restoring to plaintiff's treasury the sums so diverted by or for the benefit of the defendant company.

Again, if it were necessary to the defence of this case to show such a ratification of these payments by the stockholders of plaintiff corporation as to estop them from seeking to hold defendant liable, it must have been made to appear that all the plaintiff's stockholders had so ratified, in view of the law, as understood by us, that the acts to be so ratified in this case were clearly *ultra vires*, even as to the corporation itself, and so binding by way of estoppel upon such stockholders only as had personally assented to the same.

Zabriskie *v.* Hack. R. R. Co., 18 N. J. Eq. 178.
Gifford *v.* N. J. R. R., 2 Stock. 171.
Mallory *v.* Han. Oil Works, 86 Tenn. (2 Pickle).
Keene's Executors Case, 3 DeG. M. & G. 279.

VII.

The Court below at the close of its opinion introduced the words following: "Again, *this contract has been executed*. It expired in 1878"; and thereupon the Court proceeded to cite or refer to the rule of law that the "executed dealings of corporations must be allowed to stand for or against both parties when the plainest rules of good faith require it."

If it were true that this traffic contract had been carried into complete execution by the parties to it in a particular way, this fact might have been a good answer to the claim of the plaintiff corporation to a rectification of the accounts, or to the making of any inquiry whether it had failed to receive what was its due under said contract.

In this case, however, the execution of the contract was committed to a third person termed a Manager, or managing agent, for both parties; the terms of the contract were duly observed by this common agent for about fifteen years, but after that time the common agent failed to conform to that part of the contract relating to the division of the net earnings between the two contracting parties, so that the plaintiff, instead of receiving thirty-one per cent of all net earnings, was allowed thereafter and during the latter years of the term to receive much less than thirty-one per cent of the same, by reason of deductions made by the Manager from the plaintiff's quota and paid over to the defendant, in addition to its proper quota of sixty-nine per cent of said net earnings.

This deduction from plaintiff's share, and payment to defendant, was made (as plaintiff says) by the Manager, in violation of the contract and of his duty to the plaintiff as trustee for it of the funds so taken away. As soon as the stockholders of plaintiff company became aware of this diversion they elected a new Board of Directors, instituted an

investigation and instructed the new Directors to take legal measures for redressing this alleged breach of trust. Under those instructions this suit was commenced in April, 1880. Manager Hosford, at the same time a director and large shareholder in defendant corporation, persisted in making these deductions from plaintiff's share of income and paying them over to defendant company, after the plaintiff's new Directors had undertaken to interpose in the matter by passing the vote of June 25, 1877.

Supra, p. 18 of this brief, middle.

After this vote of June 25, 1877, Manager Hosford paid over to defendant corporation $52,437.86 of the plaintiff's money, as we say.

According to the opinion of the judge of the court below neither Hosford's estate nor the defendant corporation can be held accountable for this money, because it was paid out by one and received by the other, in pretended conformity with the terms of the contract, as originally framed or modified.

The judge in making this statement, (as he did,) seems (unconsciously as we suppose) to have begged the question in dispute by assuming that the contract had been executed according to its terms. This was the bone of contention in the whole case.

The defendant corporation itself took no such ground. It is not set up in the answers, and the point seems to be made by the judge, not as forming any ground for his decision, but as tending perhaps to corroborate a decision based wholly on other grounds.

Whatever may have been the judge's notions of the matter we think further comment unnecessary on this point.

Railway Co. *v.* Keok. Bridge Co., 131 U. S. 389.

According to our understanding of this case, the court below in stating as it did (Rec. p. 410, middle) that the main question for decision was "whether the Directors" (of plaintiff company) "could bind the corporation in respect to the transactions complained of," entirely mistook the real issue in the case, as well as the position taken by the plaintiff in its argument.

"The transactions complained of" in the plaintiff's bill are not transactions of the Directors of the plaintiff company, but the transactions of the special agent or agents of the plaintiff, consisting in the application by them successively of funds, belonging to both corporations jointly, in paying or providing for the interest upon the debts of the defendant corporation alone; yet the court below, laboring apparently under the misapprehension that the questions before it were, first, as to the authority for these payments having been given by the Directors of the plaintiff, and secondly, as to the legal competency of the Directors to bind the corporation in that way, (Rec. p. 410, 7th and 8th lines from top) decided both these questions in the affirmative, and thereupon, and for these reasons chiefly, or wholly, dismissed the bill.

We have followed the reasoning of the court below in reaching this result, and endeavored to show it to be erroneous. If we have succeeded in this, it is enough for our purposes. But we think the same result could be reached through a much shorter cut, by confining the argument to the real and more simple question in the case, which, as we respectfully submit, is *whether Stark and Hosford, the successive Managers, in passing over to defendant corporation from the [redacted] moneys in their own hands* (as they did) *the interest upon defendant's debts, were acting within the scope of their own authority under the traffic contract, or any other contract by which the plaintiff corporation had become previ-*

ously bound in any way, or to which it had afterwards assented in any way or manner known to the law.

The plaintiff's bill in this case, so far as the defendant corporation is concerned, seeks to trace into the hands or possession of the defendant corporation, certain funds or net earnings passed over to it by the successive managers, Stark and Hosford, in violation of the duty or trust reposed in them by the plaintiff, and to hold those funds as still belonging to the plaintiff, notwithstanding the acts of the managers in bestowing them upon the defendant corporation in violation of the terms of the traffic contract.

The defendant corporation's answer admits the receipt by it of the sums here claimed by plaintiff (Rec., p. 22, § 17), but claims title thereto under certain agreements said to have been engrafted upon the traffic contract. Hence the main issue is whether such alterations were made in the traffic contract as to enable the defendant corporation to retain these sums as its own. The defendant corporation's answer is in the nature of a confession and avoidance of plaintiff's allegations, leaving upon the defendant corporation the burden of showing its right to hold those sums as its own.

As to the other defendants, Hosford's executors, the bill (Rec., p. 7, middle) charges their testator's estate with a liability to account for all sums withheld by the testator from the plaintiff's share (31 per cent) of the net earnings and passed over to defendant corporation, they (Rec., p. 16, middle) make substantially the same defence as defendant corporation; *i. e.*, that if any sums were so withheld it was done with the consent or authority of the plaintiff; and we submit that if plaintiff has proved its charge the burden of showing the alleged authority of plaintiff for taking or withholding these sums is upon the defendants.

A further defence was set up by both defendants in their answers to the effect that the plaintiff and defendant corporations, on Sept. 30, 1882, entered into a submission of the claims in suit to arbitration, and that an award was made thereon in favor of the defendants. (Rec., pp. 16 and 27.)

As to this last named defence it is not (as we submit) available to Hosford's executors, because Hosford was not a party to the submission; he had deceased previously. It is not available as an adjudication in favor of the defendant corporation, because no valid award was ever made under it.

Rec., pp. 285–7; or 139 Mass. Rep. p. 463.

F. A. BROOKS,
Solicitor for Plaintiff.

SUPREME COURT OF THE [illegible]

OCTOBER TERM, [illegible]

No. 166.

THE NASHUA & LOWELL R. CO., Appellant,

vs.

THE BOSTON & LOWELL R. CO., and Others.

In Equity.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Additional Brief for Appellant on question of Jurisdiction.

F. A. BROOKS,
R. J. PEERCE,
of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 166.

THE NASHUA & LOWELL RAILROAD CO., Appellant,

vs.

THE BOSTON & LOWELL RAILROAD CO., AND OTHERS.

ADDITIONAL BRIEF FOR APPELLANT ON QUESTION OF JURISDICTION.

I. No question as to the jurisdiction of the Federal Courts is presented by the record.

1. The averment in the bill that the defendants are citizens of Massachusetts, and that the complainant is a citizen of New Hampshire and a corporation established and existing under its laws, is full and explicit.

It is well settled that this averment is sufficient to give jurisdiction, unless it is disproved by evidence. *14 How. 27.*

That the defendants are citizens of Massachusetts, is conceded.

That the complainant is a citizen of New Hampshire, was traversed by the defendants by plea. And the issue of fact thus raised was decided by the Circuit Court against the plea.

That decision cannot be revised here, because the record contains no statement of the evidence (if any) adduced by the defendants in support of their plea, or by the complainant in reply to it. Nor was the decision appealed from.

The finding of the Circuit Court on this point must therefore be taken to have been right. And whether right or wrong, as the record stands, is conclusive.

2. The denial of the complainants' citizenship is renewed by the defendants in the answers.

It has been often held by this Court, that a denial of the averment of citizenship can only be made by special plea to the jurisdiction, and not by answer, or under the general issue, or by motion in arrest.

1 Peters 417; 11 ib. 80; 6 How. 1; 7 How. 199; 15 How. 354; 17 How. 47; 114 U. S. 138; 116 U. S. 588.

Since the Act of 1875 the Court has inclined to hold that if the want of the necessary citizenship can be deduced from any evidence disclosed by the record, the objection will be entertained. But it is submitted that where in addition to the averment of citizenship which gives *prima facie* jurisdiction, the fact has been distinctly put in issue by plea, and found by the Circuit Court, and no grounds upon which the finding can be revised are presented by the record, and no suspicion of collusion appears, such finding will be regarded as conclusive, as it would be upon any other fact. And that this Court will not attempt, of its own motion, upon isolated facts, introduced for other purposes, not otherwise material to the case, and not properly explained or connected by evidence, to try again, independently, the question of citizenship thus determined.

There is nothing in the recent decisions on the subject that is inconsistent with this proposition. They are princi-

pally cases of fraudulent or collusive attempts to invoke the jurisdiction of the Federal Courts. Where either the record has afforded the means of revising the finding of the Circuit Court on the question of fact, or no such finding has taken place. And the failure of jurisdiction has clearly appeared.

Farmington vs. Pillsbury, 114 U. S., 138.
Hertog vs. Memory, 116 U. S., 588.
Little vs. Giles, 118 U. S., 607.
Morris vs. Gilman, 129 U. S., 213.
Graves vs. Corbin, Oct. T. 1889.

II. But assuming that question to be before the Court, there is nothing in the record to disprove the allegation and reverse the finding that the complainant is a citizen of New Hampshire.

That it was so originally, is not denied. It was chartered in that State in June, 1835.

Its stock was subscribed, the corporation organized, its road built, and both road and organization maintained ever since.

The enquiry is then, how is it shown to have lost the citizenship which it is conceded to have once possessed.

Upon this point, the only evidence in the record consists of the charter above mentioned, the Acts of the Legislature of Massachusetts of April 16, 1836, and April 10, 1838, and an Act of the Legislature of New Hampshire of June 16, 1838. Copies of these Acts were put in as proofs in the cause, with no further evidence upon the subject.

What then is their legal effect, standing alone, upon the original citizenship of the complainants?

Whether or not they create a second corporation in Massachusetts, is not the question. Such a corporation, if it exists, is not a party to this cause, and cannot affect the jurisdiction

of the Court. Do they divest the previous corporation of the citizenship it had before?

The enquiry is answered when the Acts are perused. They attempt no such thing, nor was it in the power of the Legislature of Massachusetts to do it, directly or indirectly.

The Acts are to be taken together and read as one, because they relate and refer to each other, and were designed for a common purpose. And they are to be considered in connection with what has taken place in pursuance of them, so far as that can be ascertained from the record.

1. It is respectfully insisted that thus regarded, their result was neither to create a new corporation, nor to divest the old one of its previous presumptive citizenship. Still less to impress upon it the impossible and preposterous *status* of being a citizen of two states at the same time. These Acts were simply machinery intended to confer upon the pre-existing New Hampshire corporation an additional franchise in Massachusetts, by which it should be authorized to extend its road into that State, and to acquire the necessary land for the purpose. This is all that was sought to be effected by the legislature, and all that was effected, either in fact or in legal conclusion.

It is true that the first Massachusetts Act, (April 16, 1836,) in its terms appears to authorize a new corporation in that State, by the same name as the former one, and composed in part or in whole of the same persons. But a charter does not create a corporation; it only allows one to be created. That comes into being when its stock is subscribed and its organization effected.

No corporation was ever organized under the Massachusetts charter; there never was any stock subscribed, nor were there any stockholders or officers; the railroad company, though chartered, never existed in point of fact.

When the prior and subsequent Acts are examined in connection with this charter, it becomes apparent that it was not intended to create a separate corporation.

The original New Hampshire charter (*Sec. 12*) conferred authority upon the complainant to extend its road to Lowell, in Massachusetts. That was a part of the original scheme.

While that charter contained the usual and necessary requirements by which the subscription and division of the capital stock, and the making and collection of assessments thereon, and the first meeting and organization of the corporation are provided for, the subsequent Massachusetts charter has no provisions of that sort. It contains almost nothing except the authority to build the extension of the road to Lowell.

Then follows the Massachusetts Act of 1838, no stock subscription or organization having taken place meanwhile, so far as appears; and by this Act it is provided that "the stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the Legislature of New Hampshire in the year 1835, *are hereby constituted stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the Legislature of this Commonwealth in 1836.*" And this proceeding is ratified by the Legislature of New Hampshire, two months later, by the Act of June 26, 1838.

The unification of stock thus effected was not therefore the union of two capital stocks. There never existed but one. It was a provision by legislative enactment that the stock of the New Hampshire corporation should be constituted that of the Massachusetts corporation, and the latter thus merged in the former; and the consolidation of property was merely the conferring on the former the franchise and right to acquire real estate necessary to the construction and maintenance of that portion of the road which lay in Massachusetts, in pursuance of its original design.

In this respect the case is the same in principle as that of *Cen. R. Co. vs. Georgia, 92 U. S., 665*, where it was held that a consolidation of two corporations created no new one, but only amounted to a merger of one in the other, under the charter of that other; since no stock remained to the corporation merged, and the only stock of the consolidated concern was the previous stock of the other.

The corporation has ever since, as ever before, been maintained as a New Hampshire corporation, having its principal place of business and organization there.

And the result of all the action that has taken place, legislative and corporate, has been merely to confer upon that company the right to extend its road into Massachusetts. A result indirectly and perhaps awkwardly accomplished, but not the less real, and the one intended by all parties concerned.

In no sense has it taken away or impaired the original corporate existence of the complainant under the laws of New Hampshire. Nor in any wise affected the presumption that its corporators remain as they always were, citizens of that State.

If the facts on this point do not clearly appear, that is not to be taken against the complainant. The burden of proof is on the other side. This objection was not anticipated when the record was made up. The question is whether facts enough are made to appear against the complainant, to disprove the citizenship it has once established, if it is now open to be disproved at all.

If this view is correct, the case is brought directly within the decisions of this Court, that the conferring upon a corporation of one State additional franchises in another, does not affect its previous citizenship for the purposes of jurisdiction.

Indiana &c. R. Co. vs. St. Louis &c. R. Co., 118 U. S. 290, S. C. 9 Bissell, 144.

See also Williams vs. Mis. R. Co. 3 Dillon, 267 and *Mis. R. Co. vs. J. & St. L. R. Co., 10 Fed. Rep. 497.*

2. But if this construction of the legislation in question and of the proceedings in pursuance of it should not obtain the assent of the Court, and it should be held that they did result in the creation of two corporations, one in each State, the jurisdiction of the Federal Court over the case would still remain.

a. The Massachusetts corporation thus formed is not a party to the cause, nor is it necessary that it should be.

It is at the most, if it has a legal existence at all, a merely nominal and constructive body, having no possible interests in this cause or any other, except in identity with those of the complainant, and no power of being heard or represented except through the complainants.

Howe vs. B. and M. R. Co., 18 Fed. Rep., 80.

It is well settled that a nominal or really unnecessary party need never be joined, even though the joinder might be otherwise proper, when the effect would be to oust the jurisdiction of the Court.

b. If it were necessary to make the Massachusetts corporation a party, it might with entire propriety be made a defendant. And as such would not affect the jurisdiction.

Ind. R. Co. vs. St. L. R. Co. 9 Bissell, 144.

3. In either view of the case, whether it is held that there was but one corporation, or that two were in fact created and afterwards united, the original citizenship of the complainant in New Hampshire remains unimpaired. And it is impossible that it should have been rendered for the purposes of jurisdiction, a citizen of two states at once.

The corporation as such has no citizenship. It stands upon that of its corporators. It is conclusively presumed and cannot be controverted that the citizenship of the corporators is in the State of the charter. Such was the necessary presumption in

the present case, from the time of the New Hampshire charter in 1835, to that in Massachusetts in 1836. If the latter created a new and separate corporation, the presumption as to the citizenship of the corporators in the old one still remained unaffected, at least until the second of the Massachusetts Acts, in 1838. The question then is whether the union of the two corporations effected by that Act, rebuts the presumption that was previously conclusive. But how could it have that effect? It did not introduce any new corporators. It could not change the citizenship of the previous corporators from New Hampshire to Massachusetts, because the corporation remained at least equally that of New Hampshire. It could not create a presumption that they are citizens of two states at once, because that is impossible in fact, impossible under all rules of law applicable to the subject of domicil, and impossible under the Constitution of the United States. No such presumption can therefore be entertained.

That the union of the property of two corporations, and the authority to unite their corporate action thereafter, and to exercise franchises in two States does not prevent them from remaining two corporations, nor rebut the presumption of the citizenship of either, has been repeatedly decided by this Court, by State Courts, and by various Federal Courts.

R. R. Co. vs. Whitton, 13 Wall. 270.

Muller vs. Dows, 94 U. S. 444.

Per Story J., Farnum vs. B. Canal Co., 1 Sum. 62.

Per Drummond J., C. W. R. Co. vs. L. S. R. Co., 5 Fed. Rep. 19, and N. R. Co. vs. C. & P. R. Co.

Per Cooley J., Ch. & N. W. R. Co. vs. Aud. Genl., 53 Mich. 91.

R. Co. vs. Farmers Co., 49 Ill. 348.

B. Co. vs. Adams Co., 88 Ill. 619.

The observations of the Court in *O. & M. R. Co. vs. Wheeler*, (*1 Black 286*) do not affect the question. In that case the plaintiff was averred in the declaration to be a corporation chartered by two different States, with nothing to show which charter if either was prior or paramount. It was therefore the averment of a void and impossible corporation, and one which if it had a legal existence could not set itself up as a citizen of either State, and would be equally presumed to be a citizen of both.

It is *the franchise to be a corporation*, under which the presumption of citizenship arises. Other franchises may or may not be conferred by the charter, or by subsequent legislation of the same or of other States. And under such franchises, various powers of the corporation, in various places, may be derived. But its corporate existence is under the original franchise for that purpose, and remains always the same; it can only be conferred upon it once, and by one jurisdiction, and can only be taken away by the authority that gave it.

A charter is nothing but a statute. And until two legislatures can unite in passing one statute, a corporation cannot derive its corporate existence from two States at the same time.

If two corporations are created in different States, they must remain two so long as they exist at all, whatever unity of property or of corporate action they may come to acquire.

If there is created but one, then its creation determines its citizenship, whatever additional powers it may afterwards obtain, and from whatever authority.

Of the first of these propositions, the case of *Clark v. Barnard 108 U. S. 436* is an illustration. In which, speaking of the result of a corporation in one State acquiring a charter in another, and acting through the same organization, officers and agencies in each, the Court say, "it would thus be constituted into two distinct corporate entities in the two States, acting in

each according to the powers locally bestowed, as distinctly as though they had nothing in common as to name, capital or membership."

Of the second, the cases of *Cen. R. Co. v. Georgia* and *Ind. &c. R. Co. v. St. L. &c. R. Co.* above cited, and *R. Co. v. Koontz, 104 U. S. 5*, are examples, among others, to the same effect.

And it is to be observed, that the right of a corporation existing in one State to sue in the Federal Courts of another, neither depends upon, nor can be taken away by any law of that other. If it has a corporate existence in the State of its charter, the right to sue in any other district is an incident to such existence and a right under the constitution and laws of the United States.

E. J. PHELPS.

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CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 166.

NASHUA AND LOWELL RAILROAD CO., *Appellant*,

v.

BOSTON AND LOWELL RAILROAD CO. ET ALS.

Additional Brief for Appellant, on Question of Jurisdiction.

E. J. PHELPS,
F. A. BROOKS,
Of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1889.

NASHUA & LOWELL RAILROAD CORPORATION,
APPELLANT,

v.

BOSTON & LOWELL RAILROAD CORPORATION,
ET AL.

BRIEF FOR PLAINTIFF ON THE QUESTION OF JURISDICTION, ETC.

FACTS.

PART I.

The Bill of Complaint in this case is brought by the Nashua & Lowell Railroad Corporation, as plaintiff, against the Boston & Lowell Railroad Corporation and Hocum Hosford, as defendants; (it has been discontinued as against the other defendant, Bartlett).

The bill describes the plaintiff as a corporation "duly established and existing by the laws of the State of New Hampshire," and as "a citizen of said State of New Hampshire."

It describes the defendant corporation as a corporation duly established by the laws of the State of Massachusetts, and as "a citizen of said State of Massachusetts," and the defendant, Hosford, as a citizen of said State of Massachusetts.

Record, page 1.

In the second paragraph of the bill the plaintiff alleges that it "is, and for many years has been, a corporation under the laws of the State of New Hampshire . . . and that the Boston & Lowell Railroad Corporation, (defendant), is, and for many years has been, a corporation under the laws of said State of Massachusetts, owning a railroad extending from Lowell to the city of Boston, Mass."

Record, page 1.

The executors of Hosford filed their answer to the bill Oct. 1, 1883, in which answer they admit the Boston & Lowell Corporation, defendant, to be a Massachusetts corporation and citizen, and further say, among other things: —

"That the Nashua & Lowell Railroad Corporation was originally chartered by the State of New Hampshire, on the twenty-third day of June, A. D. 1835, by an Act which authorized the construction of a railroad from Nashua, in said State, to the State line of the Commonwealth of Massachusetts." . . . "That on the tenth day of April, A. D. 1838 (by mistake, as printed for April 16, 1836), the Commonwealth of Massachusetts granted a charter authorizing the construction of a railroad from the State line in New Hampshire, at the termination of the said Nashua & Lowell Railroad in New Hampshire, to Lowell, in said Commonwealth . . . : that in the year 1838, the Legislatures of Massachusetts and New Hampshire authorized the union of these two corporations in one, and they were so united, and as such united corporation, they issued common stock, constructed said railroad from Lowell, aforesaid, to said Nashua, and have always operated the same as one corporation."

Record, page 17, middle and below.

The answer of the Boston & Lowell Corporation, defendant, contains the same statement in this respect, and also a further statement in the words following, viz: —

"That said two last-named corporations" (meaning the Nashua & Lowell Corporation of New Hampshire and of Massachusetts respectively) "accepted said Acts of said two States" (meaning the two Acts of union); "and organized under the same and constructed and owned a railroad extending from Nashua in the State of New Hampshire to Lowell in Massachusetts."

Record page 204, top.

Replications were duly filed by the plaintiff to both these answers, the effect of which was to deny the allegations respecting the acceptance of the Acts of Union aforesaid, and the new organization said to have taken place under the same.

Record page 18, bottom, and 47, middle.

These allegations of the defendants as to the union of the two separate corporations of each State, into a new and single corporation of both States, and the subsequent construction by the new single corporation of the entire road in both States were entirely unsupported by evidence, or by anything contained in the record, and could not have properly received any consideration in the court below, and therefore cannot now receive any from this court, as a Court of Appeal.

The only evidence to be found in the record, apart from the admissions of defendants in their answers respectively, which bears upon the question of the status or character of the plaintiff corporation is contained in the stipulation printed at the top of page 9 of the record, by which it was agreed as between the plaintiff and defendant corporations, that the contract set up in the plaintiff's bill was, in fact, made or entered into between the plaintiff and defendant corporations, the plaintiff corporation so contracting being described in the bill as "a corporation duly established, and existing by the laws of the State of New Hampshire," and as "a citizen of said State of New Hampshire," and as having been for many years "a corporation under the laws of the State of New Hampshire owning a railroad extending from Nashua in New Hampshire to Lowell in Massachusetts."

From the New Hampshire charter incorporating the Nashua & Lowell Railroad in that state alone (1835), and from the Massachusetts charter incorporating the Nashua & Lowell Railroad in that State alone (1836), it appears that the corporators were the same persons in both cases, viz: Jesse Bowers, Ira Gay, Daniel Abbott, etc., etc.

The act subsequently passed (1838), by the State of New Hampshire, authorizing the two separate corporations to unite, does not purport to confer any new franchise whatever upon the two separate corporations, or either of them, or to dispense with either or both of said then existing corporations. What it did, or attempted to do, was really to permit the funding or conversion of the separate, several, or divided interest of each stockholder, in each corporation, into a common, or joint, or undivided interest in both alike, equal in value to the sum of the two separate interests previously held.

The New Hampshire Act for this provides (§1) as follows:

"And from and after the time said corporations shall be united, all property owned, acquired or enjoyed by either of said corporations shall be taken and accounted to be the joint property of the stockholders for the time being of said two corporations."

If the property in question, instead of being corporate effects, had consisted of say one thousand acres of adjacent land, lying one half in the State of New Hampshire and one half in the State of Massachusetts, one acre in each State being owned in severalty by each natural person, these persons might, by agreements and conveyances between themselves, become tenants in common, and undivided of the whole thousand acres. But as corporate shares are the creatures of State legislation, no such funding could take place in regard to their separate property represented by them without legislative sanction. But this sanction did not require the creation of a new corporation, nor the grant of a new franchise to an old corporation. Nothing more was necessary than to permit the stockholders of the two old corporations to interchange their shares with each other, and to permit them to become, as it were, tenants in common of both pieces of property, instead remaining tenants in severalty in each one as before.

It was possible for these individual stockholders to have made this interchange of shares with each other, if they could

have issued the new shares in fractional sums of all denominations, and been content to hold two sets of certificates, as before, one for each railroad.

By these acts of concurrent legislation in the two States, each of the two corporations was authorized to form a union with the other in the nature of a partnership, though strictly speaking a partnership between corporations of different States was legally impossible, owing to the rule of law, that all State legislation is confined within the limits of its own territorial jurisdiction, and can have effect beyond those limits only by the courtesy or comity of other States, and not by any power or force of the legislating State itself; so that the partnership legislation of 1838, relating to the two roads, did not take effect positively in Massachusetts, and the similar legislation of Massachusetts did not take effect in New Hampshire for the creation of any new corporate entity, but only as the expression of the concurrence of each State in the act of the other, that is, by way of comity.

It was provided by Article 1, of Section 2, of the By-Laws, that there should be an annual meeting of the corporation on the last Wednesday of May in every year, at such time and place in Nashua village as the directors may appoint, at which meeting all officers shall be chosen.

Record, page 52.

In pursuance of this by-law, the annual meetings of the plaintiff corporation were always held at Nashua, N. H.

The traffic contract, which forms the subject of the plaintiff's bill of complaint in this case was authorized by the stockholders of the plaintiff corporation at a special meeting of such stockholders, holden at Nashua, N. H., Sept. 22. 1858.

Record, page 184, bottom.

It was at the annual meeting of the stockholders of the plaintiff corporation, holden at Nashua, N. H., May 29, 1878, that they passed the resolution instructing or requesting the directors to take proper measures for recovering the sums embraced in this suit. The resolution so passed was in these words: —

"Resolved that the stockholders of this Company have learned with surprise from the report of the directors this day presented, the fact of the vote passed at the directors' meeting holden July 23, 1872, and the result of that vote thus far in depriving this company of more than $150,000 and in bestowing the same upon the Boston & Lowell Railroad Company;

"Therefore, resolved, that in our judgment this vote was passed in the interest of the Boston & Lowell Railroad Company and in entire disregard of the rights and interests of this Company; and of the terms and provisions of the joint traffic contract itself:

"Resolved, that the directors this day elected are requested to take proper measures for restoring to the treasury of this company the sums so diverted from it by the Boston & Lowell Railroad Company."

Record, page 186, top.

Pursuant to the instructions of that stockholders' vote this present suit was brought.

We deem it important, that the court should observe that in all the cases discussed in the reports and cited, or referred to, in this brief, the corporation charters granted by particular State governments have purported as we believe, to extend beyond the limits of the State granting such charters and into the territory of some adjoining State, while in the case at bar, the grant of corporate powers originally made to the Nashua & Lowell Railroad (so-called), both in New Hampshire and Massachusetts, was confined in each case within the State limits; and two entirely distinct and separate corporations were thus created in the first instance, and the additional legislation procured by each of those corporations in each State in 1838 did not purport to extend the laws of New Hampshire into Massachusetts, or vice versa, but merely to authorize a

union or combination of the capital and ownership of these two separate corporations, by the same persons who were theretofore the owners of each by separate titles derived from each State separately.

Part II.

The facts set forth above comprise, as we believe, everything found in the appeal record, or properly belonging to said record, either as printed for the use of the appellants' court, or omitted in printing.

But they do not embrace certain proceedings which took place in the Circuit Court upon a plea in abatement to the jurisdiction of that court, filed by all three of the original defendants, of which plea, and the action had thereon in the court below, this court was not probably aware when it authorized an argument in this court upon the question of jurisdiction. However this may be, the plaintiff's counsel in preparing this brief have, in the first instance, discussed the jurisdictional question as presented by the appeal record, not including the proceedings had in the Circuit Court on the plea to the jurisdiction there filed, which plea was heard by said Circuit Court, and overruled, and the defendants thereupon ordered to answer the bill, as they did.

By thus submitting to the order or decree of the court below, overruling their plea in abatement to the jurisdiction of the United States Court, the defendants (as we understand) elected finally not to rely upon their plea in abatement, but to be confined to such defences as could be availed of by way of answer, and by Rule 39, of the U. S. Equity Courts, it is provided that parties shall not be entitled by answer to avail of matters of abatement, or relating to the character of the parties, or of form.

39 Equity Rule.

Issues were joined upon the answers of defendant, and the case heard upon the merits, and a final decree entered dismissing plaintiff's bill, from which decree only the plaintiff took an appeal, thus leaving for the consideration of this court on appeal, as both parties supposed, only the question of the correctness of the decision of the court below upon the merits. But, as the plaintiff is now called upon by this court to show its right to litigate at all in the court below, we feel not only authorized, but in duty bound, to bring to the attention of this court all that was done in the court below in passing upon the question of jurisdiction when it was raised at the only time it could properly be raised and disposed of finally and forever, as we shall hereafter undertake to show to the satisfaction of this Court.

LAW.

I.

The citizenship of the plaintiff in New Hampshire, as a corporation, created by and existing under the laws of that State alone, was set forth and averred in the plaintiff's bill, and was either proved or admitted, or both: —

Record, pp. 1, 9, 17, 19.
Sheppard *v.* Graves, 14 How. 27.

"In that case it was determined by this Court, that "whenever jurisdiction shall be averred in the pleadings in conformity with the laws creating those" (U. S.) "courts, it must be taken, *prima facie*, as existing, and that it is incumbent on him who would impeach that jurisdiction for causes dehors the pleading, to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof both rest upon the party taking the exception."

II.

Not only was this allegation of the New Hampshire citizenship of plaintiff alleged and proved, or admitted, in this case, but there was no proof or evidence whatever, in the case, to show that this New Hampshire corporation ever availed itself of the provisions of the act of New Hampshire Legislature, authorizing it to become joined to, or united with, the Massachusetts corporation of the same name, so as to become, with that, one corporate body, and as such to represent the rights and interests of both the old corporations; nor any evidence even, that it undertook to organize, or did organize, under the said act or the acts of union of the two States.

If we are correct in this statement, then no question arises, or can arise, upon the record, concerning the supposed effect which would have been produced upon the citizenship of the New Hampshire corporation, had that corporation become united with the Massachusetts corporation, and both of them changed into a new single corporate body, deriving its existence from the legislation of both States, and not from either State alone.

III.

Suppose, however, it does appear of record (contrary to our statement), after the creation in New Hampshire and Massachusetts respectively of two distinct and separate corporations under the name of the Nashua & Lowell Railroad Corporation (one for each State), that "in the year 1838 the legislatures of Massachusetts and New Hampshire authorized the union of these corporations into one, and they were so united, and as such united corporation, they issued common stock, constructed said" (a) "railroad from Lowell, . . . to . . . Nashua, and

have always operated the same as one corporation," this being the exact language of the defendant's answer in this case, as quoted by us.

IV.

Let us, then, consider what was, or would have been, the legal effect of this state of facts, if any, in changing the citizenship of the original New Hampshire corporation into that of a citizenship of the States of both Massachusetts and New Hampshire, . . . as it is claimed by the defendants in this case was accomplished by these acts of union.

The effect of concurrent legislation in two different States, designed to authorize the union or consolidation of two corporations previously existing separately in each State, upon the citizenship of these corporations, has already been passed upon by this court, either directly or indirectly, and rules of law laid down for determining the same.

We will first cite the doctrines of law announced by this court with reference to this matter. In B. & O. R. R. *v.* Harris (12 Wall. 65), this court, through Mr. Justice Swayne, observed: —

> "For the purposes of Federal 'jurisdiction it" (a corporation) "is regarded as if it were a citizen of the State where it was created and no averment or proof as to citizenship of its members elsewhere will be permitted."

In Bank of Augusta *v.* Earl (13 Peters, 519), this court, by Taney, C. J., said: —

> "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists by force of the law, and where that ceases to operate, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty." Although it (the corporation) "must live in that State only" (the State from which its charter is derived), "there is no insuperable objection to its power of contracting in another. Naturally persous

through the intervention of agents are continually making contracts where they do not reside, and what greater objection can there be to an artificial person, by its agents, to make a contract . . . in a sovereignty in which it does not reside."

In 13 Wall. 270, Chicago R. R. *v.* Whiton, Mr. Justice Field, in delivering the opinion of the court, remarked: —

"Here the objection to the jurisdiction arises that the defendant is also a corporation under the laws of Illinois, and therefore, is a citizen of the same State as the plaintiff." (Whiton) "The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and, as such, a citizen of Wisconsin by the laws of that State. It is not *there* a corporation or a citizen of ane other State."

In 94 U. S., 444 Muller *v.* Dows, Mr. Justice Strong, in giving the opinion of the court, observed: —

"Still it is argued on behalf of appellants that the Chicago & S. W. R. R. Co. cannot claim to be a corporation created by the laws of Iowa because it was formed by the consolidation of the Iowa Company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statute of each State. Hence it is argued that the corporation was created by the laws of Iowa and of Missouri; and as Barnes, one of the plaintiffs, is a citizen of Missouri, it is inferred that the Circuit Court has no jurisdiction. We cannot assent to this inference. . . . The laws of Missouri had no operation in Iowa."

We next invite the attention of the court to the discussions and decisions of this same question by other courts.

Farnum *v.* Blackstone Canal Co., 1 Sumner's Rep. 62, Story, J., says: —

"Although in virtue of these several acts, the corporations (one of Rhode Island and one of Massachusetts) acquired a unity of interests, it by no means follows that they ceased to exist as distinct and different corporations. Their powers, their rights, their privileges, their duties remained distinct and several as before, according their respective acts of incorporation. Neither could exercise the rights, powers or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations acting within the sphere of their respective charters for purposes of common interest; and not as a case where all the powers of

both were concentrated in one. The union was of interests and stocks, and not a surrender of personal identity or corporate existence by either corporation."

In Racine & Miss. R. R. Co. *v.* Farmers L. & T. Co. (49 Ill. 348) the Court says: —

"Our view of the effect of the consolidation . . . between the Rockton Company (of Illinois) and the Wisconsin Company . . . is briefly this: While it created a community of stock and of interest between the two companies, it did not convert them into one company, in the same way and to the same degree that might follow a consolidation of two companies within the same State. Neither Illinois nor Wisconsin in authorizing the consolidation can have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither State could take jurisdiction over the property or proceedings of the corporation beyond its own limits, and as is said by the Court in the Ohio & Miss. R. R. Co. *v.* Wheeler (Black 297), a corporation 'can have no existence beyond the limits of the State or sovereignty which brings it into life and endows it with its faculties and powers.'"

Quincy R. R. Bridge Co. *v.* Adams Co. 88 Ill. 619.

In this case the plaintiff was a consolidated corporation, so called, created by the laws of Illinois and Missouri, for bridging the Mississippi River between those two States. The plaintiff Bridge Company, to avoid taxation in Illinois, claimed to be a corporation of both States, and not of either alone.

The Court, in its opinion, says: —

"It is said by appellant, this corporation, although it derived some of its power and, in part, its corporate existence, from this State (Illinois), derived an equal part from the sovereign State of Missouri, and, therefore they are not a corporation under the laws of either State. To this it is answered, and we think satisfactorily, that the Legislatures of this State and of Missouri cannot act jointly, nor can any legislation of the last named State have the least effect in creating a corporation in this State. . . . The States of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible in the very nature of their organizations that they can do so." "They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two States without being a corporation of each State or either State. As argued by appellee, the only possible status of a company acting under charters from two States is, that it is an association incorporated in and by each of the States, and when acting as a corporation in either of the States, it acts under the authority of the

charter of the State in which it is then acting, and that only," "the Legislature of the other State having no operation beyond its territorial limits."

In Chicago & N. West. Railroad *v.* Auditor General (53 Mich. 91), Cooley, C. J., in his opinion, says: —

"It is familiar law that each corporation has its existence and domicil, so far as the term can be applicable to the artificial person, within the territory of the sovereign creating it. . . . It comes into existence there by an exercise of sovereign will, and though it may be allowed to exercise corporate functions within another sovereignty, it is impossible to conceive of one joint act, performed simultaneously by two sovereign States, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but when the two unite they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."

The case of Indianapolis & St. Louis Railroad Company, (118 U. S., 290) more nearly resembles the case at bar than any other reported case.

That was a case brought by the St. Louis, Alton & Terre Haute Railroad Company, a corporation created originally by the State of Illinois, as plaintiff, against the Indianapolis & St. Louis Railroad Company, a corporation of the State of Indiana. The Pennsylvania Railroad Company, a corporation of Pennsylvania, was also a defendant. This case was brought in the United States Circuit Court for the District of Indiana, and was there heard and decided by Judges Drummond and Gresham, sitting together, and is reported in 9, Bissell, page 144, from which report we take the facts as below stated: —

The bill itself in that case contained the allegation that under and by virtue of the statutes of the States of Indiana and Illinois, "Your orator was and is the owner of a railroad extending from the city of Terre Haute, in the county of Vigo, in the State of Indiana, to East St. Louis, on the Mississippi River, in the State of Illinois . . . having the power to operate and maintain its said road under the laws of said States."

The Indiana corporation, defendant, put in a plea to the jurisdiction of the court, alleging that: —

"Under various acts of the Legislatures of Illinois and Indiana there were two corporations, one, the plaintiff, the St. Louis & Alton & Terre Haute Railroad Company, (of Illinois), and another, the same company in name, (in Indiana), and that there has been a consolidation of the two corporations, created respectively by the States of Illinois and Indiana, and that they are inseparately connected together in such a way that the plaintiff is really a corporation as well of Indiana as of Illinois, and as some of the defendants (meaning the Indianapolis & St. Louis Railroad Company) are corporations of the State of Indiana, the court cannot have jurisdiction of the case."

Judge Drummond, in deciding this case, sustained the jurisdiction of the Circuit Court, and remarked: —

"If the defendant corporation, though consolidated with another of a different State, can be sued in the Federal Court in the State of its creation, as a citizen thereof, (referring to the cases of Railroad *v.* Whiton, 13 Wall., 270; and Muller *v.* Dows, 94 United States, 444), why can it not sue as a citizen of the State which created it.

"I can see no difference in principle. It seems to me that when the plaintiff comes into the Federal Court, if a corporation of another State, it is clothed with all the attributes of citizenship which the laws of that State confer, and the shareholders of that corporation must be conclusively regarded as citizens of the State which creates the corporation, precisely the same as if it were a defendant. So I do not see why, if the plaintiff in this case alleges, as it does, that it is a corporation created by the laws of Illinois, it cannot institute a suit in the Circuit Court of the United States of Indiana against a corporation of that State."

The decision of this case turned chiefly upon the point whether the fact, conceded in that case, that the plaintiff corporation of Illinois had become also an Indiana corporation had thereby lost its existence, or identity, or rights of citizenship as an Illinois corporation, that is, the right of suing in the United States Court for Indiana, as a corporation of another State (Illinois).

The Court held that it did not, that it still remained an Illinois corporation, with all its right of action in United States courts as such, although it had taken on another citizenship, or become a citizen of Indiana, with all the rights and liabilities of such new citizenship superadded. The Court held that

the two citizenships were distinct and separate, and did not create a dual corporation under the two grants, as was contended on the part of the defendants.

In the case at bar, there is no proof or admission from which it appears that the New Hampshire corporation ever did become a citizen of the other State, Massachusetts. But if this court finds any such fact in this case, even then it is no objection to the jurisdiction of the Circuit Court, according to the case in 9 Bissell, 144. and 118 U. S. 290.

This decision was affirmed by this Court.

From the report of this same case, after removal to this court, it appears that the plea to the jurisdiction filed in the court below, was withdrawn in that court, so that the question of jurisdiction was not taken before this court, by force of the appeal of the parties. It was, however, fully examined, and considered, and passed upon by this court of its own motion, and the ruling of the court below, on the question of jurisdiction expressly sustained.

Indianapolis & St. L. R. R. Co. *v.* St. Louis, A. & T. H. R. Co., 118 U. S. 290.

It seems that in the Indiana case (9 Bissell, 144), the same objection, of the defect of parties, was taken as by defendants in the case at bar, viz : the non-joinder as plaintiff of the Indiana corporation (of the same name). The Court remarked that under such circumstances, "the two corporations must be considered as distinct, the one having its habitat in Illinois, and the other in Indiana, and the shareholders in one being conclusively considered as citizens of Illinois, and of the other as citizens of Indiana," and also suggested that even if the Indiana corporation had the joint interest with the Illinois corporation, it might be made a defendant instead of a co-plaintiff, and all objections to the jurisdiction of the court, because of citizens of the same State being found, both plaintiff and defendant thereby removed.

From this remark of Judge Drummond it seems quite clear that the plaintiff in the case at bar might have joined the Massachusetts corporation, the alleged partner of plaintiff, as defendant, had the court below sustainde the objection for defect of parties, and thereby avoided that difficulty.

The case at bar differs, as we suggest, from this case (Indianapolis and St. L. R. R. Co.), in a very material respect. The plaintiff at the case at bar did not become a Massachusetts corporation at all, and as such, a citizen of Massachusetts, unless it was made so by force of a Massachusetts act of April 10, 1838, for uniting the two old corporations of these two different States, and it is not easy to see under the decisions above cited how it was possible for the Massachusetts Legislature to change a New Hampshire corporation into a Massachusetts corporation, even if it intended to do so; nor does it appear from the Massachusetts act authorizing a union of the two old corporations, that it was intended to create any new corporation, nor that it was necessary to do so for any of the purposes of the business union of interest contemplated by this act.

In Antelope Co. *v.* C. B. & Q. R. R. Co., (16 Fed. Rep. 295), the doctrine as follows was laid down by Judge McCrary: —

> "The true rule upon this subject is, that where the State does not assume, by its legislation, to create a corporation, or to require a foreign corporation to become domestic, but recognizes the existence of such foreign corporation, and its right to come into the State and transact business therein, — such foreign corporation remains a corporation of the State under whose laws it was created, and for the purposes of the jurisdiction of the Federal Courts, a citizen of that State."

The same doctrine had been previously laid down by Judge McCormick in Mo. K. & T. R. R. Co. *v.* Texas & St. L. R. R. Co., (10 Fed. Rep. 497.)

Under the guidance of the rules of law established in the cases above mentioned, numerous decisions have been made, all to the effect that the union or consolidation of railroads existing in different States and organized under the laws thereof, respectively, as separate and distinct organizations, does not make them one corporation or company, nor affect them in the

same manner as would a union or consolidation of two or more corporations when each is situated within, and existing, or organized under the laws of the same State. Railroad corporations created separately by two States, though physically joined so as to make them practically one line of railroad, are not regarded as the same legal entity in each State, but each is treated as a separate corporation and organization, although they may by force of such legislation in both States have a community of property and pecuniary interests, and may contract with others through the same officers or agents, such contracts being regarded as made by each of the bodies so united; and after such a permissive union of interests and capital, the original corporate franchises, especially the franchise of being a corporation derived from either State separately, is not lost or taken away by the mere exercise of the legislative sanction, given by the other State that the respective enterprises should be combined, and have a purse and management in common, under the same officers.

In the light of the decisions above mentioned, the question now before the court is:

Whether the plaintiff in this case, originally a citizen of New Hampshire, had become a citizen of the same State with the defendants; that is, of Massachusetts.

This question is to be determined by the record as it is, or as it would be if full and complete, including, of course, all the evidence in the case.

We submit that, from this record, it appears that the plaintiff was a corporation, created by the laws of New Hampshire in 1835, as alleged in the bill, and, as such was, and still is, a citizen of the State of New Hampshire in the meaning of the laws of the United States relating to the jurisdiction of the

United States Courts in cases between citizens of different States.

We know of nothing in the record to control this statement except the averment found in the answers of the defendants, to the effect that the Nashua & Lowell Corporation, of New Hampshire, and another corporation of Massachusetts, of the same name, became united in, or about, the year 1838, and thereby became merged into a single corporation created by, or owing its existence to, the laws of both Massachusetts and New Hampshire, and that, if so, the effect would be (by a fiction of law) to furnish a presumption, not to be controlled by evidence, that the New Hampshire corporation was no longer exclusively composed of citizens of New Hampshire, but was composed in part of citizens of Massachusetts also, and was, therefore, incapable of maintaining a suit in the Federal Court against other citizens of Massachusetts.

And this theory of defendants (as now presented) rests upon certain legal presumptions as to corporate citizenship established by judicial decisions, and these presumptions can never be set up unless consistent with all other legal presumptions equally well established by the same decisions.

We therefore submit that it is well settled as a rule or presumption of law that a corporation created by the law of a particular State is, for all purposes of jurisdiction of United States Courts, a citizen of that State, and of that State alone, and that such citizenship of one State cannot be changed into a citizenship of some other State in whole, by the laws of that other State, or affect thereby in any way, although the original corporation might, perhaps, acquire an independent citizenship in some other State, in which event there would be two distinct corporate bodies, each one being a citizen severally of one of two different States, by having its prior citizenship adopted, and recognized, and extended, or established anew in the second State.

It is not pretended that any such action as this has taken place by any law of Massachusetts in this case by which the corporate citizen of New Hampshire has been adopted, and recognized, or created as a corporation of Massachusetts, as well as of New Hampshire. The utmost that Massachusetts could do in this respect would be to create a new Massachusetts corporation out of material furnished by New Hampshire. It could not create a mongrel corporation, domiciled at the same time in both States.

The fiction of law that all the shareholders or members of a corporation created by a particular State are citizens of that State, so that the corporation takes upon itself whatever legal benefits or burdens attach to that relation, would become absurd if applied to a corporation supposed to be created and organized simultaneously under the legislation of two or more different States. If any such fiction or presumption of law were to be applied to such a state of facts, it would follow that the members of the corporation must all be, at the same time, citizens of or domiciled in two or more different States, an impossibility in fact as well as in law.

The plaintiff in this case, not being a natural person but an artificial one, cannot be a citizen anywhere, except in theory of law or by legal presumption. It is established that the citizenship of a corporation is that of the State of its creation. This gives the plaintiff in this case its right to sue in the United States courts as a citizen of New Hampshire, and of that State alone, and this suit has been brought in the exercise of that right. It does not appear that this citizenship has ever been parted with by the plaintiff, or taken away. Even if it were true that the same artificial person had acquired a like citizenship in another or a second State, it would not detract from any rights acquired under its first citizenship, nor would it disqualify it from resorting to or exercising any rights

belonging to the first citizenship. If it were necessary for it to choose between two such privileges, it might prefer to surrender the second rather than the first, and should be permitted to choose which to sacrifice whenever it may become necessary to elect. We do not question that if the same artificial person which we call the Nashua and Lowell Corporation in New Hampshire, were also a Massachusetts corporation it could not sue citizens of Massachusetts in the United States courts. But this artificial being in New Hampshire is nothing except in New Hampshire and cannot exist in Massachusetts except by sufferance or comity, and can have no migratory power any more than a Court of the State of New Hampshire would have if it should attempt to exercise its New Hampshire functions within the State of Massachusetts.

To say, therefore, that a New Hampshire corporation can be transferred into Massachusetts by force of Massachusetts legislation, and continue to exist in part as a New Hampshire corporation and in part as a Massachusetts corporation, with a domicile in both States, would be a contradiction in terms, or an incorrect use of terms in their legal sense, as it seems to us.

Part II.

But we respectfully submit, that, if this Court is now, of its own motion, to enter into an investigation as to the jurisdiction of the Circuit Court over this cause, it should be confined to a revision of the decision made by that Court of that question as presented to it by the plea in abatement to the jurisdiction filed by the three original defendants at or soon after the commencement of the suit.

We do not concede that the decision of the Circuit Court is open to revision by this Court at this time under the circumstances of this case, unless it is so under or by virtue of the

provisions of the fifth section of the Judiciary Act of 1875. We will refer to this point later in our brief, and in the meantime will consider whether, if so revisable, this Court would have reached any different decision or result from that reached and pronounced by the lower Court itself on this point.

The bill contained the allegation that the orator, Nashua and Lowell Railroad, was a corporation duly established and existing by the laws of the State of New Hampshire, and was a citizen of said State of New Hampshire, and that the defendants were respectively citizens of the State of Massachusetts.

The plea of the defendants alleged that one of the then several plaintiffs, viz.: The Nashua and Lowell Railroad Corporation, at the time of filing said bill was and still is a corporation duly established and existing under and by virtue of the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, and at the time of filing said bill was not and still is not a corporation established and existing by the laws of the State of New Hampshire, and a citizen of said State of New Hampshire.

It should be noticed that this plea consists of a denial of the alleged New Hampshire citizenship of the plaintiff *in toto* and of an averment that the corporation alleged to have been created and formed under the laws of New Hampshire, and known as the "Nashua and Lowell Railroad Corporation," was a corporation established and existing under and by virtue of the laws of Massachusetts, and was a citizen of Massachusetts.

It will be perceived that the issue presented by this plea was a very narrow and a very different one from that presented by the answers subsequently filed by these defendants, which has been the subject of discussion in the first part of this brief.

The Circuit Court did not sustain this plea, but overruled the same.

Was this decision of the lower Court erroneous? If it was, then has it been brought before this Court for revision by either

party? or is it now properly before it for revision by virtue of the provisions of the fifth section of the Judiciary Act of 1875?

It has not been brought before this Court by the appeal of the plaintiff, because the decision below was in favor of the plaintiff, and not appealable by him. It has not been brought here by appeal taken by the defendants; they elected to submit to the decision, and to go into a defence on the merits, in which they prevailed, and they did not attempt to introduce the same matter of defence into their answer, as they were forbidden to do this by the thirty-ninth rule of Equity Practice; hence it is no part of the record properly before this Court. If, therefore, this same question is now properly before this Court as the Court of Appeal at all it must be so by virtue of the fifth section of the Act of 1875, March 3.

We respectfully submit that by this section of the Statute of 1875, the decision of the Circuit Court is only open to revision by this Court when the Circuit Court declines jurisdiction and when this Court is appealed to by the party whose suit has been dismissed in that court.

It is true that all right of appeal to this court was taken by Act of 1877, Sect. 6, except as to cases commenced before the passage of that act, including the present case, which was begun before 1887.

It may, however, be imagined or supposed that the opinion of this Court in the case of Scott *v.* Sandford may be regarded as authority for the proposition that an appeal taken by a plaintiff from a final decree against him on the merits brings up with it as a part of the record the proceedings of the Circuit Court in overruling a plea of the defendant to the jurisdiction taken as a preliminary defence under the thirty-ninth rule of the Court, and if this were true in that case it ought to be so in this case.

We deny the parallelism of the two cases. This case differs from that in several important particulars.

In the first place, the plea of defendant in that case was demurred to by the plaintiff, the effect of which, of course, was to admit all the averments of the plea.

The Court will perceive that if the plaintiff had demurred to the plea in this case, it would have operated as an admission that the plaintiff was not a citizen of New Hampshire, and was a citizen of Massachusetts, and would have put the plaintiff out of court as by confession of his own false allegation in the bill.

In the second place (19 How. 397, Scott *v.* Sandford), the defendant, Sandford, after the overruling of his plea to the jurisdiction, did not abandon the point so first taken by plea, but pursued the same, and by agreement of counsel, and with the leave of the Court, pleaded the same matter again in bar (instead of in abatement, as before), and an agreement of the facts in writing was made and filed embracing the facts previously set up in the plea, all of which facts, by being set forth in the Bill of Exceptions of the plaintiff, and in that way, became or were made a part of the appeal record on the merits as fully as if they had never been embraced in or passed upon by the Court below as a matter in abatement only. (19 How. 399, Scott *v.* Sandford.)

If we shall succeed in convincing this Court of the correctness of the decision of the Court below on the plea in abatement, but shall not have succeeded in showing the absence of all other grounds for throwing this case out of court in this tenth year of its age, and long after the plaintiff's claim against the defendants will have been lost by mere lapse of time, we desire still to insist that the two defendants stand in very different positions in regard to the jurisdictional question, by reason of the fact that Hosford's executors do not even allege that the Massachusetts or New Hampshire acts of union were ever accepted or availed of or acted upon by the Nashua and Lowell Corporation of New Hampshire, as brought into existence by charter granted in June, 1835; and no proof whatever of this has been put into the case, so far as we are aware.

We respectfully suggest to this Court, in case it should consider the position of the defendants in regard to the alleged defect of parties plaintiff for the non-joinder of the Massachusetts corporation as standing in the way of plaintiff's recovery, that the cause be remanded to the Circuit Court to enable the plaintiff to join the Massachusetts Corporation as a defendant, if in the opinion of the Circuit Court the plaintiff shall be entitled to adopt that mode of overcoming the present alleged defect of parties. To this point, we cite Lewis *v.* Darling, reported in the sixteenth volume of Howard at page 1.

Finally, if it should appear to this Court that the record of this case as brought up by the plaintiff's appeal contains any matter disclosing a want of jurisdiction of the Circuit Court over this cause, then we submit that this case be remanded to the Circuit Court, with instructions to that Court to pass upon this question in the first instance, in order that the plaintiff may not be deprived of the benefit of appeal from any order of dismissal which that Court itself might see fit to pass, as provided in and by fifth section of the act of March, 1875, relating to the judiciary.

We do not understand it to be in the power of the Circuit Court to dismiss a cause under the act of 1875 for want of jurisdiction, unless such want of jurisdiction or collusion shall be made to appear from some lawful evidence already existing, and of record, or else to be produced and be made a part of the record; and we think that the plaintiff should be entitled to combat the evidence produced or relied on as showing want of jurisdiction, and be heard thereon in the court below, before any order of dismissal shall be entered in that court.

Barry *v.* Edmunds, 116 U. S. 550.
Hartog *v.* Memory, 116 U. S. 588.

F. A. BROOKS,
Plaintiff's Solicitor.

Taking it to be true that Sect. 5 of the Act of March 3, 1875, gives the Circuit Court power to dismiss causes of its own motion for want of jurisdiction, whenever such want of jurisdiction was made to appear of record in any way, independently of the pleadings, yet there was no occasion for such a statute where the question of jurisdiction was raised by the parties by appropriate pleadings for that purpose, as in this case When that question has been once raised by the parties themselves, and determined by the Court in favor of its jurisdiction, and the case has proceeded many years under that decision, it would hardly seem competent for the Circuit Court, of its own motion, under the authority of the Statute of 1875, to again open the same jurisdictional question and reverse its former decision; more especially, after it had gone on four years and heard the case on its merits, and then entered a final decree dismissing the plaintiff's bill on its merits.

We also respectfully submit that if the Circuit Court could not, within the intent and meaning of the Act of March, 1875, have reopened the plea and reversed its decision, then neither can this Court, as a court of appeal only, properly do the very same thing of its own motion. And we especially urge the point in this case, because, as we submit, the effect of such action, if taken by this Court, would be to deprive the plaintiff of the right of appeal from the Circuit Court to this Court secured by the final clause of the fifth section of said act, as originally passed, and as still applicable to the case at bar, pending prior to 1887.

Before the Act of 1875, Sect. 5, no appeal lay from the decision of the Circuit Court to this Court upon a plea in abatement to the jurisdiction by either party. If the plaintiff, under the Act of 1875, can no longer rely on such decision in his favor, as final, it certainly should not be deprived of the benefit of that statute in affording him an appeal, when the decision shall be changed into an adverse one.

F. A. BROOKS,
Plaintiff's Solicitor.

Office Supreme Court, U. S.
FILED,
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JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 166.

NASHUA & LOWELL RAILROAD CORPORATION,
Appellant,

v.

BOSTON & LOWELL RAILROAD CORPORATION ET AL.,
Appellees.

BRIEF FOR BOSTON & LOWELL RAILROAD CORPORATION.

By J. H. BENTON, Jr.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 166.

NASHUA & LOWELL RAILROAD CORPORATION,
Appellant,

v.

BOSTON & LOWELL RAILROAD CORPORATION ET AL.
Appellees.

Brief for Boston & Lowell Railroad Corporation,

BY J. H. BENTON, JR.

This is a bill in equity to recover $208,086, with interest, which was paid by the plaintiff to the defendant at various times between the years 1871 and 1879, under the following circumstances: —

On the 29th of January, 1857, the Boston & Lowell Railroad Corporation, defendant, existing under the laws of Massachusetts (which I shall for convenience term the Lowell Corporation), owned and operated a railroad from Boston to Lowell, twenty-six miles, and a branch to Woburn, a mile and a half in length; and the Nashua & Lowell Railroad Corporation, plaintiff, existing under the concurrent legislation of Massachusetts and New Hampshire (which I shall for convenience call the Nashua Corporation), owned and operated a railroad extending from Lowell to Nashua, N. H., thirteen miles, eight miles of which was in Massachusetts

and five in New Hampshire. The Nashua Corporation had leases of the Stony Brook Railroad, extending from its line at North Chelmsford to Groton Junction, about fourteen miles, in Massachusetts, and of the Wilton Railroad, extending from Nashua to Wilton, about thirteen miles, in New Hampshire.

Deposition of *J. G. Abbott*, int. 5, Record, p. 78.

On that date the two corporations made a contract which recited the fact that a large portion of the business of the roads of both the parties was joint business, in which they had mutual interests as to the mode of transaction, the tariff upon it, and all other matters relating thereto, and provided that for the promotion of the mutual interests of the parties through a more efficient and economical joint management and operation of the roads, and for the convenience and interests of the public, the railroads of the two corporations with their respective branches should be "worked and managed as one road" for twenty years. Record, p. 9.

The contract then provided that the roads of the parties should be "operated and managed by one agent chosen by the concurrent vote of a majority of the directors of each party, and removed by a like vote, or by the unanimous vote of the directors of either party," and that the "respective boards of directors should by such concurrent action exercise the same control over the management as is usual with boards of railroad directors in ordinary cases." Record, p. 11.

The contract further provided that each corporation should surrender to the joint management thus constituted the "entire control of their respective roads, shops, depots, furniture, machinery, tools, or other property necessary for the proper maintenance and working of the joint roads," reserv-

ing only certain specified property, which was not necessary for the operation of the roads; and also that the leases held by the Nashua Corporation of the Wilton and the Stony Brook railroads should be assumed by the joint management, to be carried out and renewed during the continuance of the contract for the joint benefit of the parties thereto. Record, p. 10.

The contract further provided that the Lowell Corporation should complete in the year 1857 a passenger station in Boston, with the approaches thereto, and alter its then passenger station in Boston into a freight station, and should also construct a crossing over the Fitchburg road, and a connection with the Grand Junction Railroad at its separate expense; and that the roadbed, bridges, superstructure, depots, buildings, and fixtures of each road should be kept as nearly as might be in like relative repair from their then state and condition, and all casualties and damages to the same, except fire risks on buildings, should be at the common risk and charged in the current joint account; that in case of destruction or damage by fire, the party owning the building should rebuild or replace it, or such substitute therefor as the wants of the joint business might require, at its own cost, but that such party *should not at its separate cost be required to erect a more expensive building in any case than the one injured or destroyed.* Record, p. 12.

The contract also provided that the rolling stock and machinery of the two corporations should be inventoried and appraised and be kept in equal comparative repair from their then state and condition, and that any additions thereto above what might be necessary to cover the depreciation should belong to the parties in the same proportion as was provided for the division of the joint income.

The contract then provided that the income and expense accounts of the joint roads should be "made up as nearly as conveniently might be by estimate to the close of each month, and the net balance appearing should be divided and paid over on account to the treasurers of the two corporations, thirty-one per cent to the Nashua Corporation, and sixty-nine per cent to the Lowell Corporation," *subject to a final adjustment at the semi-annual closing of the accounts;* and that on the first days of April and October in each year the said accounts *should be "accurately closed and balanced out by settlement with each party, covering and adjusting all previous payments on account,"* the plaintiff receiving as its proportion thirty-one per cent of said joint net income, and the defendant receiving as its proportion thereof sixty-nine per cent. Record, p. 13.

In brief, the contract provided for the operation of the roads of the parties by a common agent appointed by the directors of both roads, and removable by them or by the unanimous action of either of them, for the preservation of the roads and property of the parties in like relative condition and repair as they then were at the joint expense and for the division of the net results of such operation in the proportion of thirty-one per cent to the plaintiff and sixty-nine per cent to the defendant, payments on account of such division to be made monthly, and final settlement and adjustment thereof to be made semi-annually.

The contract did not provide, however, for any addition to, or improvement of, the road and property of either party for the purpose of accommodating increased business. Under it neither party was obliged to expend any money in adding to its plant or increasing its facilities for the public accommodation and the benefit of the joint business of the two roads. Of course it was obvious that additions and

improvements to the roads and properties of the two corporations for the purpose of properly doing the business which they were bound to do and promoting their joint interests would be required during the continuance of the contract, and that a contract under which the two roads and properties were to be kept as they then were would be one impossible to execute. But as it was impossible to decide in advance what improvements and additions would be required, or in what proportion it might be proper for each party to furnish them, the parties necessarily left these questions to be settled as they might arise, and the necessity for additional facilities upon the line of either road to be provided for in such manner as might be found proper whenever it should arise.

From the time the joint operation of the roads began under this contract, each corporation, by the consent of the other, and for their joint benefit, increased its mileage by the construction of new roads and the acquisition of branches, until in 1874 the Nashua Corporation reported to its stockholders that the two corporations then operated under the contract an aggregate mileage of one hundred and thirty-five miles, or more than double their mileage at the time the contract was made. Record, p. 322.

Thirty-three miles of this was added by the acquisition of the Salem & Lowell and the Lowell & Lawrence roads in 1858, and sixteen miles was added by the purchase of the Lexington & Arlington Railroad in 1869. Record, pp. 49, 334.

The roads of the two corporations were terminal roads, and the business of connecting roads in New Hampshire and beyond to the north and west was "valuable and necessary to their prosperity."

Deposition of *George Stark*, Record, p. 120.

Contracts for this business were therefore made by the two corporations with the companies controlling the roads from which it came. These contracts covered the business of the Concord, the Manchester & Lawrence, and the Northern railroads of New Hampshire and their branches, of the Vermont Central and Passumpsic railroads of Vermont and their branches, the Ogdensburg Railroad of New York, and the Northern Transportation Company, owning steamboats on the great lakes, and their connections, extending to Chicago and the West. The business brought from these roads to the roads of the two corporations was in the vicinity of three hundred thousand tons of freight and two hundred thousand passengers annually.

Deposition of *C. S. Mellen*, Record, pp. 230, 231.
"Defendant's Exhibit," Record, p. 389.

These contracts are found in the Record, pp. 358–387, and shown by the votes of the directors of the Nashua Corporation on April 26, 1856, August 23, 1864, December 27, 1864, February 27, 1865. See Record, pp. 296, 301, 302.

By this addition to the mileage of the two corporations, and under these contracts with connecting roads, as well as by the natural increase of business upon their original roads, the business of the two corporations rapidly and largely increased soon after the operation of roads under the contract began. George Stark, who was superintendent of the Nashua Corporation before the contract, for many years clerk of its directors and the managing agent of the two corporations under the contract from 1857 until 1875, testifies that between the years 1860 and 1873 the passenger business of the two roads increased one hundred and ninety-six per cent, the freight business thirty-five per cent, and

the gross receipts of the two corporations from $544,000 to $1,420,000, an increase of one hundred and sixty-one per cent, and that in consequence the accommodations at Boston for the business became quite insufficient, and the insufficiency increased as the business increased; that various means were used to increase the capacity of the terminal facilities at Boston, until in 1872 it became apparent that a new passenger station must be constructed. He also testifies that from time to time he brought the knowledge of this insufficiency of the accommodation for freight and passengers to the knowledge of the board of directors of each road, and reported to them the fact that the northern and upper roads had other outlets open to them for their freight and passenger business to and from Boston, and that "*it became manifest that the two corporations could not retain the business of these roads without largely increasing the facilities at Boston.*"

Deposition of *George Stark*, ints. 13, 15, Record, p. 119.

He also testified that as the result of this the upper connecting roads were asked to contribute an additional five cents per passenger on their business to enable the Lowell Corporation to make the necessary outlay for the passenger station, and that while they declined to make this allowance they offered to continue their business with the two roads if the increased facilities were afforded and to submit to a terminal charge upon freight of thirty cents a ton, which they had previously refused to pay, and that subsequently, upon the increased facilities being furnished, they did pay this terminal charge to the two corporations, thirty-one per cent of which was received by the Nashua Corporation during the continuance of the contract:

Deposition of *George Stark*, ints. 14, 16, 19, Record, pp. 118, 120.

This increase of business is also shown by the report of the Nashua Corporation to its stockholders for the year ending March 31, 1873, as follows: —

> "Our earnings are derived from a varied and somewhat extensive net-work of interests. Under the joint contract of partnership with the Boston & Lowell Railroad we operate in common, and are interested to the extent of thirty-one per cent in the receipts and expenditures of one hundred and fifteen miles of railroad, viz.:
>
> | | | |
> |---|---|---|
> | The Boston & Lowell road, with its Woburn, Stoneham, Lexington, and Mystic branches, | 42 | miles. |
> | The Nashua & Lowell road | 14 | " |
> | The Wilton | 15 | " |
> | The Stony Brook | 13 | " |
> | The Lowell & Lawrence | 13 | " |
> | The Salem & Lowell | 18 | " |
> | Total | 115 | miles. |
>
> "This mileage is expected to be increased by the opening, during this season, of the Middlesex Central road, an extension of the Lexington branch through Bedford to Concord, Mass., a distance of eight miles, and of the Peterborough road, an extension of the Wilton through Lyndeborough to Greenfield, ten miles, bringing the miles of road to be operated next season up to 133.
>
> "To illustrate the steady growth of business upon these several roads we append a tabular statement of receipts, miles run, and passengers and tons transported in each year since 1862. *The increase of gross receipts is from* $201,000 *to* $603,000, *or* 200 *per cent.*
>
> "*The increase of passengers carried one mile is from*

*three millions to eleven millions, and the increase of freight is nearly 200 per cent.**

Record, p. 316.

As was found by the Circuit Court, "It is clear from the evidence that to meet the increased business of the joint roads and to retain their connection with other lines, it was the opinion of those charged with the management of the roads that increased terminal facilities at Boston were necessary." The two corporations united to provide facilities for this increased business at that and other points where they were required.

These facilities were required to some extent at the terminus of the road of the Nashua Corporation in Lowell, where freight houses were erected by that corporation, and at Winchester, on the road of the Lowell Cor
chiefly at the terminus of the road of the Lo
tion at Boston. The expense of providing
borne by the Nashua Corporation and the interest upon
was paid by the two corporations in the proportion in which they shared the net receipts under the joint contract, *i.e.*, thirty-one per cent by the Nashua Corporation, and sixty-nine per cent by the Lowell. The improvements at Winchester were made by the Boston & Lowell Corporation, and the interest upon the expense was paid by the two corporations in the same proportion. The improvements at Boston were provided partly by the purchase and improvement of real estate by the two corporations jointly, in the proportion of thirty-one per cent by the Nashua and sixty-nine per cent by the Lowell, and partly by the purchase of land and the construction of buildings by the Lowell Corporation, and the payment of interest upon the expense in

*The italics are mine.

the proportion of thirty-one per cent by the Nashua Corporation and sixty-nine per cent by the Lowell.

The purchases and improvement of property by the two corporations at Boston consisted of the purchase of storehouses and wharves on Lowell street for the increase of freight facilities, and the purchase of what is known as the Mystic wharf property, then in Charlestown, now Boston, and the erection of grain elevators thereon.

Deposition of *J. G. Abbott*, ints. 19, 24, Record, pp. 81, 83.

Deposition of *J. G Abbott*, int. 29, Record, p. 87.

It was at one time proposed by the Nashua Corporation that it should take title to and own thirty-one per cent. of the new terminal passenger station in Boston, as it had done in the matter of the purchase of wharves and warehouses on Lowell street and of the Mystic wharf property, but this proposition was abandoned, and the method of providing the new station at the expense of the Lowell and the sharing of the interest upon that expense by the two corporations in the proportion in which they were interested under the contract was adopted instead.

Deposition of *J. G. Abbott*, int. 29, Record, pp. 86, 87.

It became necessary that the passenger station in Boston should be extended as early as 1860. The directors of the two corporations appointed a committee to consider in what manner this extension could be provided, and on December 24, 1860, the committee on the part of the Nashua Corporation reported that as such extension would render it necessary to use a portion of the land reserved under the joint contract to the use of the Lowell Corporation, it was

equitable that the joint roads pay a rental, and the directors of the two corporations then agreed that the two roads should pay such rental in the proportion in which they shared the receipts of the joint business, — sixty-nine per cent by the Lowell Corporation, and thirty-one per cent by the Nashua Corporation. Record, p. 298.

This extension was soon found to be wholly insufficient, and the matter of providing additional station accommodations at Boston was a matter of very frequent discussion between the directors of the two corporations, and was brought to the attention of the stockholders of the Nashua Corporation, as appears by the record of their meeting on May 25, 1864, when the directors were empowered to invest the contingent fund of the corporation in lands, warehouses, or other real estate for the better accommodation of the business of the corporation, either upon the line of the road or at the Boston terminus of the two roads. Record, p. 351.

The result was an application by the Lowell Corporation to the legislature of Massachusetts for proper legislation to enable land to be taken for the construction of a new passenger station in Boston. In obtaining this legislation the Nashua Corporation joined with the Lowell.

Deposition of *J. G. Abbott*, int. 14, Record, p. 80.
Deposition of *George Stark*, int. 21, Record, p. 120.

The directors of the Nashua Corporation appointed a committee to act with a committee of the Lowell Corporation in regard to such new station, and the directors of the two corporations sent the joint manager of the two roads to Europe for the purpose of examining the best methods of constructing terminal stations then being used in England and in France, and paid his expenses while thus engaged.

Deposition of *George Stark*, int. 51, 52, Record, 126, 127.

By the legislation obtained in Massachusetts the Lowell Corporation was authorized either alone or with the Eastern Railroad Company (which had a terminal station adjacent to that of the Lowell Corporation in Boston) to take certain land in Boston "for the purpose of increasing depot and terminal facilities," and to increase its capital not exceeding one million of dollars.

Immediately upon this legislation being obtained the Lowell and Nashua corporations joined in negotiations with the Eastern Railroad for the construction of a union passenger station. The records of the directors of the Nashua Corporation in relation to their action in this matter are as follows: —

The record of their meeting on September 28, 1869, states that —

> "The manager submitted plans for the improvement of the terminal facilities at Boston under the act of the last legislature authorizing the taking of land; and it was voted that Mr. Sigourney be a committee on the part of this company to act in conjunction with Messrs. Crowninshield, Minot, and Abbott of the Boston & Lowell board in reference to the same."

The record of their meeting on November 23, 1869, states that —

> "The Committee upon the Improvement of Terminal Facilities at Boston, under the act of the legislature, reported that an interview was had on the eighth inst. with the committee of the directors of the Eastern Railroad, and that after a protracted conference in which the Eastern company asked for a delay until after another legislative session, notice was given them of the intention of the Lowell Railroad Company to proceed to locate on

land adjacent to Andover street unless the Eastern road would signify before this date its intention to join them in the benefits of the act. No communication has since been received from the Eastern road, and the committee recommend that the Lowell Railroad Company now proceed at once to locate upon so much of the territory embraced in the act as lies between their present lands on the northerly side of Andover street, and the westerly side of Causeway street, and the northerly side of Nashua street. The report was accepted and the Lowell Railroad board —

"Voted, That Messrs. Crowinshield and Abbott be a committee with the manager to prepare a location and report the same for ratification at the next monthly meeting of the board."

The record of their meeting held December 28, 1869, shows that —

"The committee on new location in Boston reported a communication from the Eastern Railroad Company signifying their intention to recommend to their stockholders to join in the improvements. The said committee advised that no farther action be taken until after the annual meeting of the companies."

The record of their meeting of October 25, 1870, shows that —

"The manager submitted a written report upon the subject of negotiations between the Boston & Lowell Railroad Corporation and the Eastern Railroad Company, relative to taking land under the act of 1869, for enlarging the depot facilities in Boston. The report was accepted and ordered to be placed upon file, and the manager was directed by the Boston & Lowell board to notify the Eastern Railroad Company that the negotiation was closed."

The record of their meeting held January 24, 1871, shows that —

> "The manager submitted and read an estimate of cost of the proposed new station house in Boston, and presented plans of the same."

The record of their meeting held February 20, 1871, shows that a communication was received from the president of the Eastern Railroad stating that a committee had been appointed to confer "with reference to terminal facilities and arrangements in Boston," and that, —

> "After full discussion of the subject matter of the above letter, it was —
>
> "Voted, That the committee having formerly in charge the negotiations with the Eastern Railroad relative to terminal facilities in Boston, viz., Messrs. Crowninshield and Sigourney of this board, with Messrs. Minot and Abbott of the Boston & Lowell board, be requested to meet the committee of the Eastern road and to report at the next regular monthly meeting."

The record of their meeting of May 28, 1872, shows that it was voted —

> "That the president and Mr. Sigourney, with such as the Boston & Lowell board may join, be a committee to confer with the Eastern Railroad Company in reference to providing additional depot facilities in Boston for their road."

It thus clearly appears that in this matter of joint interest the two corporations, through their directors, acted together at all steps, and that the action of the Lowell Corporation was taken in connection with and upon the substantial request of the Nashua Corporation.

The negotiations with the Eastern Railroad resulted in

nothing, and it was finally concluded that it was for the interest of the two roads (the Lowell and the Nashua corporations) that the new station should be built by the Boston & Lowell independent of the Eastern Railroad, and land was taken under the act which they had procured for that purpose, and the old station was taken down and a new one built on the land where the old one stood and on additional land.

Deposition of *J. G. Abbott*, int. 14, Record, p. 80.

George Stark, the clerk of the Nashua Corporation, and manager of the two roads under the contract, testifies that after the negotiations with the Eastern Railroad failed —

> "The directors of the two companies — the Boston & Lowell and the Nashua and Lowell — agreed together that the Boston & Lowell Company should construct the passenger station, and that the Nashua & Lowell Company should pay thirty-one per cent of the accrued interest upon the outlay, computing the interest at seven per cent per annum."

Deposition of *George Stark*, int. 24, Record, p. 121.

The record of the meeting of the directors of the Nashua Corporation held May 24, 1870, shows an application "from the town of Winchester relative to improved railroad accommodations," and that a committee was appointed "to view the premises and confer with the town committee upon the subject of their wants." Record, p. 336.

J. G. Abbott testifies that in connection with this subject of a new station at Winchester questions arose with reference to the amount of tanning bark brought down from the upper roads which there was no sufficient room to handle without the purchase by the Lowell company of additional

lands, and that improved passenger facilities were also required; that the two roads shared the benefits which came from these improvements which were made by the defendant at the request of the directors of the two companies, and as appears by a subsequent vote of the directors of the Nashua Corporation, the sum of $20,000 thus expended was regarded as the sum upon which interest ought to be paid by the two corporations in return for the benefit they received from these improvements.

Deposition of *J. G. Abbott*, int. 27, p. 86.
Vote Nashua & Lowell directors, July 23, 1872, Record, p. 311.

General Stark testified that these improvements at Winchester were necessary to accommodate business from the upper roads; that a very considerable part of the outlay was for land to accommodate upper railroad freight; and that the making of the improvements was for the mutual benefit of the two companies.

Deposition of *George Stark*, int. 72, Record, pp. 130, 131.

During the same time that the question of providing additional passenger facilities in Boston was being thus considered by the directors of the two corporations, they also considered and acted upon the matter of furnishing additional freight accommodations for the two roads in Boston, and prior to 1871 they jointly purchased land, upon which they erected freight houses, paying for the land and the erection of the buildings in the proportion of thirty-one per cent by the Nashua Corporation and sixty-nine per cent by the Lowell. In 1871 they also jointly purchased, in the same

proportion, lands and flats on Mystic river, Charlestown, for additional freight accommodations.

Deposition of *J. G. Abbott*, int. 19, Record, p 81.
Deposition of *George Stark*, ints. 9, 11, Record p. 119.

The Mystic property did not join the lands or tracks of the roads of either of the corporations, and a branch railroad was necessary to connect it with their main line of railroad, which was constructed by the Lowell Corporation. The Nashua Corporation joined in obtaining the necessary legislation to permit the construction of this branch and in the supervision of its location and construction.

Vote of Nashua & Lowell directors, December 22, 1870, Record, p. 307.
Vote Nashua & Lowell directors, January 24, 1871, Record, p. 307.

October 1, 1858, the Lowell Corporation made contracts with the Salem & Lowell and Lowell & Lawrence Railroad companies for the operation of the roads of those companies, and on the same day the Nashua & Lowell corporations agreed that the roads of the Salem & Lowell and Lowell & Lawrence companies should be operated by the Lowell and Nashua corporations on joint account during the continuance of the joint contract, any profit or loss arising from the same to be divided between them in the same proportion as provided in the joint contract for the division of the net income arising from the operation of their own roads, *i.e.*, in the proportion of sixty-nine per cent by the Lowell and thirty-one per cent by the Nashua & Lowell corporations. Record, p. 49.

These contracts between the Lowell Corporation and the Salem & Lowell and Lowell & Lawrence roads each pro-

vided that it should be terminated at any time that the other might be terminated. They were in terms leases of these roads to the Lowell Corporation for the term of twenty years, and purported to transfer to the Lowell Corporation the railroad and franchise of the two companies, with all their powers to manage and regulate the roads and to collect tolls and income thereon. See Agreement of Counsel, pp. 387, 388.

There was at that time no special or general statute of Massachusetts authorizing these leases to be made.

Deposition of *W. H. Coolidge*, Record, p. 340.

The parties to them obviously assumed, as Judge Abbott testifies was the case, to make them under section 115, chapter 63, of the General Statutes of Massachusetts, originally enacted in 1838, which provided that "two corporations whose roads enter upon or connect with each other may contract that either corporation shall perform all the transportation of persons and freight upon and over the road of the other."

Deposition of *J. G. Abbott*, int. 8, Record, p. 246. Record, p. 251.

The roads of these corporations were connected with the road of the Lowell Corporation, but this statute manifestly authorized nothing more than an operating contract, and did not authorize a lease under which a railroad corporation transferred the use and possession of its road and the right to exercise its franchise to take tolls thereon.

May 31, 1867, the legislature of Massachusetts passed an —

"Act relating to the leasing of railroads and contracts concerning operating the same," by which it provided

that "nothing contained in the 115th section of the 63rd chapter of the General Statutes shall be construed to authorize any railroad corporation to contract with any person or persons or other corporations for the operation and management of its road, or to contract to assume the management and operation of any other railroad, or to lease its own road, or to take a lease of any other railroad without special authority so to do from the legislature, provided that any such contract which has expired within three months, or shall expire within six months of the passage of this act may be renewed for a term not exceeding one year."

Record, p. 252.

It was thus made clear that the title by which the Lowell and Nashua corporations held the roads of the Salem & Lowell and Lowell & Lawrence companies was invalid. The so-called contracts between those companies and the Lowell Corporation were leases not authorized by any special act of the legislature, and plainly not authorized by the general law, and also directly within the scope of the declaratory act of the legislature of 1867 above set forth.

The roads of these two companies formed in connection with the road of the Boston & Maine Railroad a competitive line with the roads of the Nashua and Lowell corporations, and soon after the passage of the act of 1867 it was understood that persons hostile to the interests of the Lowell and Nashua corporations were endeavoring to purchase the stock of these two roads for the purpose of opening a rival line between Lowell and Boston.

Deposition of *C. E. A. Bartlett*, int. 33, Record, p. 204.

The business interests of the Boston & Maine Railroad

were adverse to the business interests of the Lowell and Nashua corporations, and the question whether the stock of the Lowell & Lawrence and Salem & Lowell companies would not pass into the hands of persons in the interest of that company, so that an opposition line would be opened between Lowell and Boston, was discussed by the directors of the Lowell and Nashua corporations.

Deposition of *C. E. A. Bartlett*, ints. 71, 75, Record, pp. 212, 213.

Mr. Bartlett, who was for many years treasurer of the Lowell corporation, and the cashier of the Nashua and Lowell corporations under the contract, also testifies that before the contracts between the Salem & Lowell and Lowell & Lawrence roads and the Lowell corporation, the roads of the Salem & Lowell and Lowell & Lawrence companies were operated together with the road of the Boston & Maine Railroad as a competing line to the road of the Lowell Corporation, to the very great injury of the interests of the Lowell and also of the Nashua Corporation.

Deposition of *C. E. A. Bartlett*, ints. 194, 195, Record, p. 229.

Chapter 386 of the Massachusetts Statutes of 1855, entitled "An act to establish an independent line of railroad communication between Boston and Lowell," shows that the operation of such a line was authorized by the legislature notwithstanding the provision in the charter of the Lowell Corporation (granted June 5, 1830) that no competing line should be established between Lowell and Boston for a period of thirty years from the date of its charter, and compensa-

tion was provided for any injury arising therefrom.* Record, p. 249.

The charter right of the Lowell corporation to an exclusive line between Boston and Lowell expired in 1860, and after the passage of the act of 1867 the subject of the defective title by which these important subsidiary roads were held by the Lowell and Nashua corporations, and of the question of strengthening that title by the purchase of a majority of the stock in the companies, was brought to the attention of the boards of the Lowell and Nashua corporations by the manager, who recommended the purchase. General Stark testifies that he "made an extended written report upon the expediency of making those purchases; that the report was submitted to the boards of directors of the Boston & Lowell and Nashua & Lowell roads, and that its consideration by them led to the purchase of the stock and to the arrangement by which the Lowell and Nashua directors agreed that their roads should share the burden of carrying it, as subsequently arranged."

Deposition of *George Stark*, int. 75, Record, p. 131.

J. G. Abbott testifies that the "matter of the purchase was discussed very fully by the members of both boards, and generally by all the members of each board; that there was a good deal of discussion with regard to it as to the almost necessity of purchase, as some regarded it, and as to the price to be paid." It was understood by all the directors of both roads, before the purchase was made, that the excess of interest on the purchase money of the stock of the two roads

* In *Boston & Lowell Railroad* v. *Salem & Lowell Railroad Company and others*, 2 Gray, 1, the establishment of such a line under an act authorizing it without compensation to any person injured thereby, was enjoined upon the ground that the provision in the charter of the Lowell Corporation providing that no such line should be established by the legislature for thirty years was property, and could not be taken or impaired without compensation to that corporation.

above the dividends received from the rental paid under the so-called leases to the Lowell Corporation should be paid by both roads in the proportion fixed by the joint contract for the division of profits; that this was carried out by charging this excess of interest to running expenses; that at the monthly meetings of the directors of both corporations this sharing of the excess of interest was communicated to the boards, and it appeared in the monthly statements submitted by the manager to them, and that from the time of the purchase in 1871 there was never any objection by any director of the Nashua company to sharing this excess of interest over dividends.

Deposition of *J. G. Abbott*, ints. 25, 26, Record, pp. 84, 85.

The evidence shows plainly that it was for the joint interest of the Lowell and Nashua corporations that the stock of these branch roads should be acquired by the Lowell, and that it was agreed by the two corporations through their directors that it should be thus acquired, and the interest upon its cost above what dividends were realized on the stock should be shared by the two corporations in the proportion in which they shared the benefit of the control of the stock, *i.e.*, the profits from the contract under which the branch roads were operated. And that after the purchase was made this excess of interest over dividends was shared by the corporations without objection by any director of the Nashua Corporation.

In short, the Nashua Corporation agreed with the Lowel that if it would purchase this stock and hold it for the benefit of itself and the Nashua Corporation, it would pay such proportion of the loss the Lowell would thereby sustain as it

was assumed the Nashua Corporation would receive of benefit from that purchase; and it did so pay it.

The Lowell Corporation borrowed the money to make these improvements at Boston, Mystic, and Winchester, and it issued its bonds therefor at seven per cent interest, running twenty years from April 1, 1872, *i.e.*, for nearly fourteen years beyond term of the joint contract which terminated October, 1878.

Deposition of *C. E. A. Bartlett*, int. 192, Record, pp. 229.

Deposition of *C. E. A. Bartlett*, Exhibit 1, Record, p. 73.

It is obvious, as J. G. Abbott, the president of the Lowell Corporation, testifies, that the directors of that corporation would not have for a moment entertained the proposition to thus borrow and spend large sums of money for the improvements on its line required for the business of the two corporations unless during the contract under which the Nashua Corporation was to have thirty-one per cent of the benefit thereof it was to pay a proportionate part of the interest thereon.

Deposition of *J. G. Abbott*, cross-int. 47, Record, p. 93.

The Nashua Corporation, by the action of its directors shown by their records and testified to by the directors and officers of both corporations, and by the action of its stockholders upon the reports of its directors, practically promised that if the Lowell Corporation would borrow this money and make these needed improvements for the benefit of both corporations it would pay the same proportion of the interest thereon that it received of the benefit therefrom under the joint contract, *i.e.*, thirty-one per cent.

If no formal action had been taken by its directors, such a promise would have been implied from their conduct as much as a promise to pay for rails or rolling stock by a corporation is implied from its receiving and using them without any formal contract, or any recorded action of its directors.

But the directors of the Nashua Corporation did take formal recorded action on this matter and by vote agreed to pay thirty-one per cent of this interest.

On July 23, 1872, they passed the following vote :—

> "Voted, That the expenditures made and to be made by the Boston & Lowell Railroad Corporation for land and building in Boston for a new station and the expenditures made and to be made by said corporation for the building and completing the Mystic River Railroad and for the improvements in Winchester for a new station and land for railway purposes, to the amount of $20,000, are to be treated in the management of the business under the joint business contract existing between said corporations and the Nashua & Lowell Railroad Corporation as follows; viz., The said Boston & Lowell Railroad Corporation are to be paid the interest upon such expenditures made and to be made at the rate of seven per cent per annum, at the end of each six month, out of the receipts of the joint corporation under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract; and the cashier of said two corporations and treasurer of the Boston & Lowell Railroad Corporation is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston & Lowell Railroad Corporation out of the joint receipts of said two corporations."
>
> Record, p. 311.

On the same day the directors of the Lowell Corporation passed a like vote.

Deposition of *C. E. Cram*, int. 12, Record, p. 67.

J. G. Abbott testifies that this vote "was merely carrying out the perfectly well understood agreement between the two boards of directors from the beginning."

Deposition of *J. G. Abbott*, cross-int. 54, Record, p. 96.

Daniel S. Richardson, a director of the Nashua Corporation, also testifies that the plan of compensating the Lowell Corporation for the interest upon the expense of the terminal facilities made by it had been often talked over and understood by the directors of both roads previous to this vote, and substantially states that the vote was simply carrying out what had been previously agreed upon between the two boards.

Deposition of *Daniel S. Richardson*, ints. 24, 25, 26, Record, p. 105.

George Stark, clerk of the Nashua Corporation, testifies that "the directors of the two companies, the Boston & Lowell and Nashua & Lowell, agreed together that the Boston & Lowell company should construct the passenger station, and the Nashua & Lowell corporation should pay thirty-one per cent of the annual interest upon the outlay, computing interest at seven per cent per annum."

Deposition of *George Stark*, int. 24, Record, p. 121.

The Nashua Corporation alleges in its bill that this vote of its directors of July 23, 1872, providing that it should pay thirty-one per cent of the interest upon these expenditures "was not passed at a meeting of the directors acting separately and distinctly for the transaction of its business, but at

a meeting composed of members of both boards of directors (of the Lowell and of the Nashua corporations), acting together as if members of the same or a single board of directors, sitting together under one presiding officer, and entertaining business matters and voting thereon as one body, or in common or jointly at one and the same time without reference to any difference in the bearing or effect of such vote upon the interests of the two corporations," and that by reason of this the vote was void. Record, pp. 5, 6.

The plaintiff apparently attaches great importance to this allegation, and much testimony has been taken upon it. The facts with reference to it, as shown by this testimony, are substantially these : —

The Lowell Corporation and the Nashua Corporation each had five directors, and from 1857 until after 1872 the same person was president of each corporation, but each board of directors had its own clerk. It was the custom of the two boards to hold regular meetings each month at the same time and in the same room. The president sat at one end of the table, on both sides of which next to him sat the directors of the Lowell Corporation, and at the other end of which sat the directors of the Nashua Corporation. All questions growing out of the execution of the contract and bearing reference merely to the contract, such, for example, as purchase of more rolling stock for operating the road under the joint contract and questions of a like character, were put to both boards jointly, but all questions in which there was or could be any supposed separate interest or liability of the corporations were put by the president first to one board and then to the other board for their separate action. This was done by the advice of Judge Abbott to the president, who consulted him with reference to the method of proceeding very early after the execution of the

contract. The clerk of each board kept his own record book in which he recorded the action of that board.

Deposition of *J. G. Abbott*, int. 31, Record, pp. 87, 88.
Deposition of *C. E. Cram*, ints. 3, 7, Record, p. 66.

The vote of July 23, 1872, is recorded on the records of the directors of each corporation and attested by the clerk of each of them as adopted by them. In the record of the Nashua Corporation it appears that the subject of expenditures made and being made by the several companies for improvements was presented for action by Judge Abbott, who was a director of the Lowell Corporation and the legal adviser of both corporations.

Plaintiff's Exhibit 4, Record p. 53.
Deposition of *George Stark*, cross-int. 116, Record, p. 142; cross-int. 123, Record, p. 144.

There is no evidence to show that these votes were not put to and adopted by each board of directors separately, so that each was the independent action of the board upon whose records it is found, and George Stark, the clerk of the Nashua Corporation, testifies that according to his best recollection nobody participated in the vote spread upon his records as the vote of the Nashua Corporation except the directors of that company.

Deposition of *George Stark*, cross-ints. 201–205, inclusive, Record, pp. 160, 161.

Mr. Richardson, a director of the Nashua Corporation and its legal adviser, testifies that the vote "was passed as the separate vote of the Nashua Corporation as it was recorded."

Deposition of *Daniel S. Richardson*, cross-ints. 62–66, inclusive, Record, pp. 112, 113.

In performance of this promise and of the contract shown

by the votes the Nashua Corporation paid thirty-one per cent of the interest up to April 1, 1872, directly to the Lowell Corporation and thereafter during the continuance of the joint contract the contract was performed by the payment to the Lowell Corporation of thirty-one per cent of the interest each six months "out of the receipts of the joint corporations," and charged as a part of the expenses of operating the railroads of the two corporations under the joint contract in accordance with the terms of this vote.

The payment of the interest to April 1, 1872, was entered upon the books of the Nashua Corporation as paid directly by it to the Lowell Corporation.

Deposition of *C. E. A. Bartlett*, Record, pp. 192, 193.

During the time when these payments which the plaintiff seeks to recover in this suit were thus made (*i.e.*, from 1873 to 1878), Charles E. A. Bartlett was the cashier of the joint roads, appointed by the directors of both roads, and his duties were to receive and disburse the cash receipts of the two roads. He was also treasurer of the Lowell Corporation.

Theodore H. Wood was chief clerk of the joint management and was also treasurer of the Nashua Corporation. The entire receipts of the two roads were received by Bartlett as cashier, and payments were made by him. The accounts of the two roads were made up and kept in the chief clerk's office.

Deposition of *C. E. A. Bartlett*, Record, pp. 190, 191.

Article 14 of the joint contract required that the income and expense accounts of the joint roads should be made up by estimate to the close of each month and the net balance appearing divided upon the general basis of division under the contract and paid over on account to the respective treasurers of the parties, subject to final adjustment at the

semi-annual closing of accounts, and that "*on and to the first days of April and October in each year the said accounts shall be accurately closed and balanced out by settlement with each party, covering and adjusting all previous payments on account.*" Record, p. 13.

Under the regulations adopted for the conduct of the business of the joint roads, it was the duty of the chief clerk to keep at the office of the manager, and in forms prescribed by him, the entire accounts of the income and expenses of the road, and "make up and apportion the net earnings between the roads under the direction of the manager in accordance with the provisions of the joint contract." Record, p. 71.

Books of account were kept by the chief clerk as thus provided, and he made approximate monthly statements to the directors of each road at their monthly meetings, showing the condition of the accounts, the state of the business, and the affairs of the two roads under the joint management. He also kept accounts between the joint roads and each road and prepared and delivered to each road semi-annual statements of these accounts, showing the receipts and expenses and the net receipts of the joint management and the proportion thereof of each road. These semi-annual accounts were spread upon the books of each corporation during the same year and were carried into the annual accounts of each of them. The amounts found due from the joint management to each road upon the settlement of these semi-annual accounts between the joint management and each road were paid by drafts or checks drawn in favor of each road on the funds of the joint road, some of them being drawn directly on the cashier of the joint roads by the manager and others on the bank account of the joint roads by authority of the manager.

Stipulation of Counsel, Record, p. 207.

These drafts and checks were by their terms drawn "*in settlement of the proportion of net earnings for the six months*" for which these semi-annual accounts were respectively made up and balanced.

Copy of Draft, Record, p. 207.
Stipulation of Counsel, Record, p. 208.

Upon the books of each corporation from April 1, 1872, during the continuance of the contract there was kept an account showing the amount of interest upon the sum paid by the Lowell Corporation for Lowell & Lawrence and Salem & Lowell Railroad stock, less dividends received thereon, and for interest on the amount paid for improvements at Winchester, at Mystic River, and at Boston.

Record, pp. 195 to 203, inclusive.
Deposition of *C. E. A. Bartlett*, ints. 32, 33, Record, pp. 203, 204.

The semi-annual accounts between the Lowell Corporation and the joint roads from March 31, 1872, to the termination of the contract, October 1, 1878, showed its proportion of the net earnings of each six months, the amount paid by it as interest on investment in stock of Salem & Lowell and Lowell & Lawrence roads above dividends thereon, and the amount of interest on the expenditure for the improvements at Winchester and Mystic River and Boston, as provided in the vote of the Nashua Corporation of July 23, 1872. And when the balance shown by these accounts was paid by the joint roads by drafts or checks as above stated, *the accounts were receipted as settled.*

See Semi-annual Accounts, Record pp. 390 to 403, inclusive.

During all this time the directors of the Nashua Corporation held meetings substantially every month in each year.

Defendant's Exhibit, Record pp. 348–350, inclusive.

The records of these meetings show that statements of the receipts and expenditures of the joint roads were made at each of the regular monthly meetings, and that at the end of each six months a statement of the receipts and expenditures for the six months was made to them.

Deposition of *William W. Bailey*, ints. 72, 73, 75, Record, p. 170.

The records of the annual meetings of the Nashua Corporation show that the report of its directors and the abstract and trial balance of its treasurer were read at each meeting. Record, pp. 351–356, inclusive.

The stockholders of the Nashua Corporation also chose each year an auditing committee, who examined the books and accounts of the company and reported to the stockholders that they found "the same clearly expressed, and all payments properly vouched." Record, pp. 314, 318, 322.

In the income and expense accounts annexed to the annual reports to the stockholders the payments on account of interest upon these expenditures by the Lowell Corporation were included under the head of "Rents," but the examination by the auditing committee of the vouchers for such payments must have disclosed the character of them, and they were not only known to the directors of the Nashua Corporation each six months, but were thus brought to the attention of the stockholders through their committees from year to year.

George Stark, the clerk of the Nashua Corporation, also testifies without contradiction that the necessity for the

facilities for which these expenditures were made were understood and talked over by the principal stockholders of that corporation at their annual meetings, and at other times, and that he never heard of any dissent from a stockholder in that company.

Deposition of *George Stark*, Record, p. 121.

The matter of improvements by each of the corporations upon its own property, and the payment by the two corporations of the interest upon the expense thereof out of their joint receipts, was also brought to the attention of the stockholders of the Nashua Corporation in other ways and approved by them.

The directors of the Nashua Corporation, in their annual report to the stockholders for the year 1872, after stating the great increase in the mileage and business of the two corporations, recommended the construction by it of a union freight yard and station on its land at Lowell, at an expense of one hundred thousand dollars, "for the accommodation of both roads," the interest upon this sum "*to be paid by the united roads*," and for that purpose "and for such enlargement of equipment and increase of yard grounds and tracks as the growing business may from time to time demand," asked authority to issue the bonds of the corporation to the amount of two hundred thousand dollars "from time to time as the expenditures for new improvements may require." Record, p. 318.

At the annual meeting of the stockholders, to which this report was read, it was voted that the directors be authorized to issue bonds to that amount "for the purpose of enlarging the freight accommodations at Lowell, for purchasing rolling stock and other needful additions to the property of the road." Record, pp. 352, 353.

In like manner the two corporations paid the loss upon the lease of the Peterboro road by the Nashua Corporation, the proportion paid by the Lowell Corporation amounting between 1874 and 1878 to $112,543.02.

Deposition of *C. E. A. Bartlett*, ints. 54 to 62, inclusive.

Record, p. 211.

And they also paid to the Nashua Corporation the interest upon the cost of freight houses at Lowell, built by it for the accommodation of their increased business at that point, as appears by the vote of the Nashua directors on October 20, 1877. Record, p. 64.

In May, 1877, the stockholders of the Nashua Corporation requested the directors to investigate and report upon the legal relations between it and the Lowell Corporation under the contract between them. Record, p. 56.

June 25, 1877, majority and minority reports were received by the directors of the Nashua Corporation from the committee appointed to investigate the relations and accounts between it and the Lowell Corporation. Mr. Richardson of the board moved to recommit the report with instructions as follows: —

> "Whereas since the contract for joint operation was made with the Boston & Lowell Railroad the joint business has increased from $729,346.70 for the year ending October 1, 1859, to $1,980,634.01 for the year ending October 1, 1873; and whereas all the profits of this increase has (have) been divided between the two companies in the proportion established by the original contract; and whereas this increase of business has required large outlays for its accommodation on the part of each company:
>
> "Voted, That this committee be requested to ascertain

and report what outlays the Nashua & Lowell Railroad Company has made for the accommodation of the joint business, and amount of said outlays, and what compensation has been received therefor, and also what outlays have been thus made, and to what amount, for which this company has received no compensation.

"Voted, That this committee be requested to ascertain and report what outlays the Boston & Lowell Railroad Company has made for the accommodation of the joint business and the amount of said outlays, and what compensation has been received therefor, and also what outlays has (have) been made, and to what amount, for which the Boston & Lowell Railroad Company has received no compensation.

"Voted, That this committee be requested to ascertain and report in what manner and proportion the burden of increased accommodations and obligations for the benefit of the joint business has been borne by the two companies, and whether any and what modification should be made in the arrangements by which these burdens and obligations or compensations therefor has been apportioned, so that these matters may be clearly understood and amicably adjusted, and so that each company shall bear joint proportion of the burdens and obligations required by the increased business, as well as receive its proportion of the profits thereof."

This motion was defeated by a vote of four to three, and by the said same majority of one the following vote was passed: —

"Voted, That whereas the vote of directors passed July 23, 1872, providing that the Boston & Lowell Railroad Company should receive from the Nashua company interest at seven per cent upon thirty-one per cent of the cost or value of additions made by the former company to its property or construction account, is

deemed by us to be in plain violation of both the terms and the spirit of the joint-traffic contract itself, said vote of July 23, 1872, is hereby rescinded, not intending hereby to admit that it was ever competent for the directors by passing said vote to modify the provisions of said joint-traffic contract relating to division of expenses, or that said vote ever had any legal operation whatever in depriving the Nashua & Lowell company of the benefits of the provisions of said contract relating to the division of the joint earnings under the same."

Record, pp. 62, 63.

August 25, 1877, the directors of the Nashua Corporation adopted the following preamble and resolution, rejecting a motion to amend the same so as to include all questions relating to the division of expenses, payments, and income between the two corporations: —

"Whereas there exists a difference of opinion between the Nashua & Lowell and the Boston & Lowell Railroad corporations in regard to the propriety of the charge made to the Nashua & Lowell Railroad Corporation for thirty-one per cent of the interest upon the cost of the Boston improvement, so called, under and by virtue of a vote of directors of the Nashua & Lowell Corporation passed July 23, 1872, therefore, to avoid all difficulty on this point, —

"Resolved, That this subject be referred for determination to the referees named in the joint-traffic contract, and that the Boston & Lowell Railroad Corporation be requested to concur in such."

Record, p. 63.

October 20, 1877, the directors of the Nashua Corporation adopted the following preamble and resolution, rejecting a resolution offered by one of their number to refer the reso-

lution to a committee of two to meet a like committee of the Lowell Corporation, to determine if such a compromise could be substantially carried out between the two corporations: —

> "Whereas the question of charging the Nashua & Lowell Railroad Company with thirty-one per cent of interest upon the cost of the Boston and Winchester depot and stock purchase in Salem & Lowell and Lowell & Lawrence Railroad companies and of charging the Boston & Lowell Railroad Company with sixty-nine per cent of the cost of the freight depot at Lowell is in dispute between the Nashua & Lowell and Boston & Lowell Railroad companies:
>
> "Therefore resolved, That, for the purpose of arriving at an amicable adjustment of the joint accounts between the two roads for the six months ending September 30, 1877, the Nashua & Lowell Railroad Company is willing to be charged in joint account with one half of thirty-one per cent of the interest of said investments made by the Boston & Lowell Railroad Company, and that the Boston & Lowell Railroad Company may be charged with only one half of the sixty-nine per cent of the outlay made by the company upon its new freight house at Lowell."
>
> Record, p. 64.

The resolutions and votes thus adopted by the Nashua Corporation were presented by Mr. Brooks, who became a member of the board at the annual election in May, 1877, and who is the counsel engaged in the prosecution of this suit. Record, p. 293.

October 9, 1877, the directors of the Lowell Corporation passed the following vote: —

> "Voted, That the directors of this corporation, if the

directors of the Nashua & Lowell Railroad Company shall desire so to do, will submit all matters and questions in reference to and growing out of the joint transaction of business by said corporations and the joint-traffic contract between them, and all other differences and questions between them of any description and all claims of any nature of the one corporation upon the other, to the arbitrament and determination of the referees named in said joint-traffic contract."

Record, p. 65.

May 29, 1878, at the annual meeting of the Nashua Corporation, the committee of the directors upon the relations between that corporation and the Lowell Corporation made a report stating that a majority of the directors did not consider that the company had received its quota of the net earnings under the joint contract, and the stockholders voted that in their judgment the vote of July 23, 1872, was in disregard of the terms and conditions of the joint-traffic contract, and requested the directors then elected to take proper means for recovering the sums paid under that vote to the Lowell Corporation. Record, pp. 291, 293, 185.

There is no evidence that any demand for repayment or accounting was ever made by the Nashua Corporation of the Lowell Corporation, except as it may be inferred from these votes.

April 17, 1880, the Nashua Corporation brought this suit. Record, p. 28.

September 30, 1882, the Nashua Corporation and the Lowell Corporation executed an agreement, which recited the fact that this suit had been brought and referred all claims made therein, and all other claims in favor of either party against the other, to the arbitration of William S. Gardner, a justice of the Superior Court of Massachusetts,

Waldo Colburn, a justice of the Supreme Court of Massachusetts, and Elias Merwin. Record, pp. 28–32, inclusive.

Deposition of *William S. Gardner*, ints. 1–3, Record, p. 237.

The parties appeared before the arbitrators, and it was agreed by them upon the first day of the hearing that the arbitrators should first hear, consider, and determine certain items of claim made by the Nashua Corporation upon the Lowell Corporation (including the claims made in this suit for the proportion of interest paid by the Nashua Corporation on the cost of the stock of the Lowell & Lawrence and Salem & Lowell roads, less dividends, and interest paid on the cost of constructing the Mystic Branch Railroad and the passenger stations at Boston and Winchester) before entering upon the hearing of any other claims of either party under the submission.

The arbitrators thereupon proceeded to hear these claims and fully heard and considered the proofs and arguments of the parties with reference thereto. Subsequently, on the 23d of May, 1883, the arbitrators met the parties and made and announced to them their award and determination in respect to said claims. The award was in writing and was read to the parties by Mr. Merwin, chairman of the board of arbitrators, each of the other arbitrators being present, and was as follows: —

> "Several of the claims made by the Nashua & Lowell Railroad Corporation against the Boston & Lowell Railroad Corporation were, by consent of both parties, submitted to the referees for their award and determination, with the understanding and reservation that the remaining claims made by the respective parties

were to remain open, either for adjustment by the parties themselves or for future hearing and determination by the referees. The items submitted to the referees, and upon which they have been requested to pass, are those numbered 3, 4, 5, and 6 in Exhibit 1, annexed to the agreement of reference. The referees have considered these items and are of the opinion, and so award and determine, that the Nashua & Lowell Railroad Corporation is not entitled to recover anything from the Boston & Lowell Railroad Corporation in respect to either of said items."

Record, p. 239.

After this award was thus made, no further testimony in relation thereto was ever offered by either party and was no change ever made in it by the arbitrators, nor was it ever withdrawn by them. The hearing before the arbitrators was then, by agreement of all parties, adjourned to a future day.

Deposition of *William S. Gardner*, Record, pp. 238, 239; Record, pp. 29, 30.

At the time and place to which the arbitrators had adjourned the hearing the parties again appeared before them and the Nashua Corporation presented certain motions asking rulings upon matters of law and also asking for a re-hearing as to the law involved in the claims which had been passed upon by the arbitrators and which were embraced in this suit. Record, pp. 34–39, inclusive.

These motions of the Nashua Corporation were overruled by the arbitrators, and with the consent of both parties the further hearing under the submission was adjourned to August 1, 1883. Record, p. 34.

On July 31, 1883, the Nashua Corporation served upon

each of the arbitrators a document reciting the proceedings before them, and setting forth that it deemed itself aggrieved by the conduct of the arbitrators, and therefore "revoked the submission, and all authority thereunder and thereby conferred upon the arbitrators, and terminated so far as it lawfully might any and all power theretofore given to the arbitrators to act under the submission." Record, pp. 34, 41, 42, 43.

On August 1, 1883, both parties appeared before the arbitrators and the arbitrators announced to them that they were of the opinion that they were bound to proceed with the hearing, if either party so desired, and that they were ready to hear them. Mr. Brooks, counsel for the Nashua Corporation, stated to the arbitrators that he did not intend to appear further and did not desire notices of any adjournments, and then withdrew. The arbitrators then proceeded with the hearing, and on August 7, 1883, made an award in which they stated that in addition to their final award and determination of May 23, 1883 (which was the award made at the request of the parties and which embraced the claims made in this suit), they awarded that the Nashua Corporation was not entitled to recover of the Lowell Corporation anything by reason of any of the claims embraced in the submission, and that the Lowell Corporation was entitled to recover of the Nashua Corporation, by reason of certain items of claim embraced in the submission, the sum of $12,148.88. Record, pp. 34, 35, 36, 37.

December 13, 1883, the Lowell Corporation brought a suit against the Nashua Corporation in the Superior Court for Suffolk County, Massachusetts, to recover said sum of $12,148.88. This action was tried by the Court, which found for the defendant, and exceptions were taken to the Supreme Judicial Court, which in March, 1885, overruled

them, and on July, 1885, judgment was entered by the Superior Court for the defendant.

Transcript of Record of Superior Court, Record, pp. 271–284, inclusive.

The contention of the Nashua Corporation in this case, as shown by the opinion of the Court, was that the revocation deprived the arbitrators of all further power of action under the submission, and the Court so held. It was not necessary that the Court should decide, and an examination of the opinion will show that it did not decide, what was the effect of the award on May 23 *as to the claims which are embraced in this suit*. It is true the plaintiff contended that the subsequent award as to the matters considered by the arbitrators after the revocation was good, because the submission was partially executed by the award of May 23, but it was not found as a fact that the parties agreed that the items embraced in the award of May 23 should be the subject of a separate award, as it has been proved, in this cause, was the case, and the Court were careful to say that the oral announcement by the arbitrators of their determination upon the items as to which their award of May 23 was made was not a part execution of the original submission "*unless* the parties had agreed that these items should be the subject of a separate award," which was not proved in that case, but is proved in this.

Deposition of *William H. Gardner*, Record, pp. 238, 239.

SUMMARY.

From these facts it appears, —

1. That the directors of the two corporations regarded it as essential for the interests of both corporations, to enable them to perform their public duties in a satisfactory manner

and to protect their joint interests under the contract of 1859, that the expenditures which were made for additional facilities at Boston and Winchester, and for the Mystic river railroad, and for the control of the roads of the Salem & Lowell and Lowell & Lawrence companies should be made, and that such expenditures were thus essential for the interests of both corporations under the contract.

2. That the Lowell Corporation borrowed the money to make these expenditures and issued its bonds running twenty years at seven per cent interest therefor upon the understanding between its directors and the directors of the Nashua Corporation that that corporation should pay during the continuance of the contract thirty-one per cent of the interest upon the expenditures, *i.e.*, the same proportion of the interest that it would receive of the benefit derived from the expenditures, and that this understanding was correctly set forth in the votes of the two boards on July 23, 1873, which were passed by the independent action of each board, as their records set forth.

3. That the stockholders of the Nashua Corporation knew of, acquiesced in, and sanctioned the arrangement by its directors that the interest upon expenditures made by each corporation for additional facilities required by the joint business done under the contract, should be paid out of the net joint earnings in the proportion in which the corporation shared those earnings under the contract.

4. That the Nashua Corporation, upon the semi-annual settlements of the division of the receipts from the joint business, paid out of its share of such receipts the proportion which its directors had agreed to pay of the interest upon the expenditures thus made by the Lowell Corporation for the joint benefit of the two corporations, which payments were shown by the books and vouchers of the joint manage-

ment, and appeared in the result of the operation of the roads under the contract as shown by the annual reports of the directors of the Nashua Corporation made and read to its stockholders and by them approved.

5. That these payments were made in good faith and without notice to the Lowell Corporation that any director or stockholder of the Nashua Corporation objected until long after the Lowell Corporation had made the expenditures and burdened itself with bonds running twenty years at seven per cent interest therefor.

6. That the Lowell Corporation offered to leave all questions arising under the contract to the arbitrators to whom by the terms of the contract it was provided that all controversies thereunder should be left, but that the Nashua Corporation declined and brought this suit.

7. That after the suit was brought the claims made in it were referred to a competent board of arbitrators who at the request of both parties for their mutual convenience heard and decided the claims embraced in this suit independent of the other claims embraced in the original submission, and awarded that the Nashua Corporation was not entitled to recover anything on account thereof. That this award was made as a distinct and independent award, and was never changed, modified, or withdrawn, though the plaintiff made and was heard upon motions to modify it.

ARGUMENT.

I. These expenditures for additional facilities, and these payments of interest by the two corporations were not required by the joint contract. But they were incidental to the carrying out of that contract, and for the benefit of the two corporations in the transaction of the business under it. Neither corporation was under obligation to join with the

other in the purchase of the wharves and warehouses on Lowell street, or of the Mystic wharf property at Charlestown. The Nashua Corporation was not bound to lease the Peterboro railroad, or to purchase land and construct additional freight houses at Lowell. The Lowell Corporation was not bound by the contract to build the Mystic River Railroad, or to provide the additional facilities at Winchester, or to purchase a controlling interest in the Salem & Lowell and Lowell & Lawrence roads, or to expend, as it did, more than a million dollars in providing a passenger station far in excess of the wants of its own business, and required only to accommodate the joint business of the two roads, coming mainly from the roads and steamboat companies to the north and the west with which the two corporations had made contracts for business. The actual state of affairs in which the two corporations found themselves, however, and the necessities of the business which they were bound to accommodate and for which they had contracted to afford facilities, required all these things to be done for their mutual benefit and advantage, and they did them by an entirely fair and equitable arrangement, *i.e.*, so far as they involved the purchase of land and property by the two corporations jointly, by purchasing and owning the property in the same proportion in which they were interested under the joint contract, thirty-one per cent by the Nashua and sixty-nine per cent by the Lowell Corporation, and in so far as they involved the expenditure of money by either of the corporations separately by agreeing to pay the interest upon the money thus expended in the same proportion.

It is conceded that the directors acted in all these matters in good faith, and it appears that they acted only after investigation, cautiously and carefully, and as it appeared and undoubtedly was, for the best interests of each corporation.

If two natural persons had done precisely what these two boards of directors did prior to the vote of July 23, 1872, there can be no possible question that each would thereby have bound himself to pay the interest upon the expenditures thus made by the other in the proportion in which the two corporations did pay them. Such a contract would have been implied from their conduct.

It is now well settled that the same rule applies to the conduct of corporations that they are affected like natural persons with obligations arising from implications of law, and from equitable duties which imply obligations, with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and generally by those legal and equitable considerations which affect the rights of natural persons.

U.S. Bank v. *Dandridge*, 12 Wheton, 64.
Bank of Columbia v. *Patterson*, 7 Cranch, 299.
Railway Companies v. *Keokuk Bridge Co.*, 131 U.S. 371.

II. The contract to pay the interest upon these expenditures and the payment of it by the Nashua directors was within their powers.

There is nothing in the record to show, and it is not claimed that there was anything in the charter of the Nashua Corporation, or in the laws of New Hampshire or Massachusetts, limiting the power of its directors to manage its affairs, and its by-laws authorized them "to exercise all powers incident to directors of corporations of a similar nature." Record, p. 51.

The plaintiff contends, however, that the division of the net joint earnings fixed by the contract between it and the defendant was based upon the expectation that the two

roads were to be kept in their then relative condition of repair at the joint expense, and that if it was desirable to make any addition to or improvement of the property of either party beyond keeping it in such relative repair, the contract itself must be modified and the stockholders of each corporation agree to any application of its proportion of the net joint earnings to that purpose, and that it was not competent for the directors of either corporation to thus apply any portion of its share of the net joint earnings, and therefore the directors of the Nashua Corporation had no power to pay, or to agree that any portion of the net earnings belonging to it under the contract should be paid, for the purpose of providing additional facilities for the accommodation of the business done under the contract. In brief the plaintiff's contention is that its directors had no power to appropriate its money to any purpose incidental to and required by the carrying on of the joint business under the contract.

The defendant submits that as the business done under the contract was the business of the Nashua Corporation, any purpose incidental to and required by it was a purpose to which its directors could properly apply its money. The fact that the contract only provides that the roads and property of the two parties shall be kept as near as may be in like relative repair, and that neither party shall be required in case of destruction or injury to any building to erect a more expensive one at its own cost, clearly indicates that it was the intention of the parties to leave the necessity which must have been expected to arise for improvements and additions to the properties of their respective parties to provide for the growth of the business and for their joint benefit in carrying it on to be supplied from time to time by the two corporations upon such terms as might from time

to time be found equitable between them. Railroads are things of growth, and it must be assumed that these two corporations when they made this contract understood that the two railroads to be operated under it would grow during the twenty years of its term, and would require considerable expenditures for additions and improvements to provide for the increase of their joint business.

Whether it was expedient that expenditures should be made by the two corporations jointly, as in the purchase of land and the construction of freight houses in Boston and in the purchase of the Mystic property, or that expenditures should be made by one corporation and interest paid thereon by the two corporations in the proportion in which under the contract they shared the benefit of the use of the improvements for which the expenditure was made, was a matter peculiarly proper for the consideration and decision of the directors of the corporations.

They were chosen and by law charged with the duty of considering and deciding precisely such questions. Suppose the directors of the two corporations had found it expedient to hire of another party the land upon which the freight houses in Boston were built, or to hire the Mystic wharf property and pay rent for it, or instead of taking additional land for the station at Boston, to hire it and pay rent for it during the term of the contract. Why could they not have done it precisely as they might hire land for a side track or for the extension of a station platform? And if in such a case the rental paid was seven per cent upon the value of the land, the proper arrangement between the two corporations for the payment of that rent would be that the Nashua should pay thirty-one per cent and the Lowell sixty-nine per cent thereof. Would not such an arrangement have been entirely within the power of the

directors? And would an arrangement of that character be any less within their power because made with one of the parties interested in the business for the accommodation of which the land was required?

In other words, would an agreement by the Nashua Corporation to pay thirty-one per cent of the actual rental, or interest upon cost in the nature of rental, to the Lowell Corporation for property which it acquired or which it had outside of that embraced within the terms of the contract, be any more beyond the power of the directors of the Nashua Corporation than an agreement to pay the same percentage of actual rental or interest upon cost in the nature of rental to an outside party?

The entire transaction which the plaintiff here brings in question was not essentially different from a transaction by which the directors of a corporation hire land for side track or station purposes and agree to pay a rental therefor. It was simply an agreement by which the Nashua Corporation agreed to pay a percentage of the interest in the nature of rental upon the cost of certain property acquired by the Lowell Corporation for the benefit of the two corporations while it was used for their benefit, and plainly within the power of its directors.

The Nashua Corporation was created by the concurrent legislation of New Hampshire and Massachusetts.

The statute of New Hampshire, in force at the time of these acts, in relation to corporations having for their object a dividend of profits provided that —

> "The business of every such corporation shall be managed by the directors thereof, subject to the by-laws and votes of the corporation, and, under their direction, by such officers and agents as shall be duly appointed by the directors or by the corporation."

Sec. 3, ch. 134, Gen. Stats. N.H.
Sec. 3, ch. 148, Gen. Laws N.H.

The statute of Massachusetts, in force during the same time, in relation to railroad corporations provided that —

> "The immediate government and direction of the affairs of every such corporation shall be vested in a board of not less than five directors."

Sec. 2, ch. 63, Gen. Laws. Mass.

The directors had "consequently the power in relation to all matters concerning the control and disposition of the property of the corporation, and in the conduct of its business to do whatever it would be competent for the company itself to do, or direct or order to be done."

Shaw et al. v. *Norfolk County R.R.*, 16 Gray, 407, p. 414.

The power of directors is derived from the charter and not from the stockholders, and they are "the acting corporation" for all purposes for which the corporation is created which the corporation or by-laws do not require shall be accomplished by the stockholders.

MARSHALL, C.J., in *Bank* v. *Dandridge*, 11 Wheat. p. 114.
Despatch Line, &c., v. *Bellamy*, 12 N.H. 205.
Eastern R.R. v. *Boston & Maine R.R.*, 111 Mass. 125.

III. The Nashua Corporation has received the benefit of the use of the property for which the Lowell made these expenditures, and even if there were any question about the power of its directors to make the contract under which

the money was paid by it or to permit the money to be paid from its portion of the net receipts of the business, it clearly could not ask that the money should be repaid without offering to return the benefit which it received from the use for which the money was paid.

But its bill contains no such offer. Its sole contention is that its directors had no power to make the agreement that the money should be paid or to permit it to be paid from its portion of the net income under the contract, and that therefore, although it enjoyed the use of the property for which the interest was paid, it can recover back the money paid without accounting for the use. Such a contention violates the fundamental rule that he who asks equity must do equity, and could not be maintained even if the payment had been *ultra vires* the plaintiff corporation.

Railway Company v. *McCarthy*, 96 U.S. 258.
Pneumatic Gas Co. v. *Berry*, 113 U.S. 322.
Camden, &c., R.R. v. *Mayo Landing, &c., R.R.*, 48 N.J. Law, 530.
Oil Creek R.R. v. *Penn. Transportation Co.*, 83 Penn State, 160.
Whitney Arms Co. v. *Barlow*, 63 N.Y. 62.

IV. The Nashua Corporation by the conduct and acquiescence of its shareholders was properly held by the court below to have acquiesced in and ratified the conduct of its directors and the contract made by them with the Lowell Corporation to pay thirty-one per cent of the interest upon the expenditures by it for the benefit of the two corporations.

The Nashua Corporation having enjoyed the benefit of this contract and arrangement by its directors, every reasonable presumption should be made in order to hold the transaction binding upon it. The arrangement between the two

corporations appeared in various forms upon the records of the directors of the Nashua Corporation and upon the accounts and minutes of its business kept by its treasurer, and was shown in detail by the books of the joint management, kept by the manager of the two roads, who was as much the agent of the Nashua Corporation as of the Lowell, and all whose books were as much open to the inspection and subject to the control of the one corporation as of the other.

Any stockholder who had examined these records and accounts would have been fully apprised of this arrangement and of all the details of the payments made in pursuance of it.

The statute law of New Hampshire at that time provided that —

> "All accounts and minutes of business of the corporation kept by its treasurer, or by any officer or agent thereof . . . shall be subject to the inspection of every member and stockholder. The clerk, treasurer, or other officer or agent of any corporation having the keeping of any such record, account, or paper, when required by any member or stockholder . . . on payment or tender of the like fees as are by law allowed to clerks of court for such service, shall furnish a certified copy of any vote, record, or account, and any original paper which such party is entitled to inspect."
>
> Sections 11, 12, Chapter 133, Gen. Stats. N. H., Record, p. 249.

Independent of any statutory provision any stockholder of the Nashua Corporation had a right to a reasonable inspection of its directors' records and its books and accounts and of the books and accounts of the joint management. The reports of its directors to the stockholders stated the

increase of the business and the improvements being made to accommodate it, and stated clearly that there was being paid from the net earnings of the two roads interest upon the expenditures by each road for additional property and improvements to accommodate this increase in business.

The whole matter was open to the inspection and knowledge of any stockholder who cared enough about the business of the corporation to inquire or look. Under all the circumstances in this case it is fairly to be presumed that those of the stockholders that cared enough about the business of the Nashua Corporation to attend its annual meetings and take any interest in its affairs by examination of its records, conference with its directors, and otherwise, substantially knew what was being done, and their assent and acquiescence must be implied from their silence and failure to object.

Gold Mining Co. v. *National Bank*, 96 U.S. 640.
Branch v. *Jessup*, 106 U.S. 468, p. 476.
Evans v. *Smallcombe*, L.R. 3, H.L. 249.
Peterboro' R.R. v. *Nashua & Lowell R.R.*, 59 N.H. 385.

IV. All the sums which the plaintiff seeks to recover in this action were deducted from the earnings of the two roads by the joint management in its semi-annual settlements with each party, and were shown in detail thereby. Record, pp. 390–403, inclusive.

These settlements were made pursuant to article fourteenth of the contract, and in the absence of fraud, which is not alleged or shown, are conclusive upon both parties. The accounts on which these settlements were based were kept under the immediate supervision of the manager of the

two roads as required by the rules for the conduct of the joint management. Record, pp. 69, 71.

This manager was appointed under the contract by the concurrent vote of the directors of each party, and although the contract provided that he might be removed by a similar vote of the directors of both parties, or by the unanimous vote of the directors of either party, it was undoubtedly within the power of the directors of either corporation to terminate his agency for it by a majority vote of its directors.

The general law of Massachusetts and the general law of New Hampshire, as well as the by-laws of the Nashua Corporation, required the management of the affairs of that corporation to be by its board of directors, and it was not in the power of the corporation to deprive its directors of that power by a contract which placed the management of its business in the hands of an agent beyond the control of its directors. Neither the corporation nor its directors could put the management of its business and property out of the hands of its directors, acting by a majority vote.

York, &c., *R.R.* v. *Ritchie*, 40 Me. 425.
Farmers, &c., *Gas Co.* v. *Chase*, 56 N.H. 341.
Groty v. *Redd*, 4 B. Mon. 183.
Silver Hook Road v. *Greene*, 12 R.I. 164.

It was therefore within the power of the directors of the Nashua Corporation to, at any time, terminate the authority of the joint agent. When its board was changed, and attempted in 1877 to rescind the vote of July 23, 1872, it had the power to terminate the agency of Hosford, the joint manager at that time, and thus stop the payment of the interest from the net earnings of the roads. This, however, would have practically terminated the contract by stopping the operation of the roads in the manner provided by it,

and thus deprived the Nashua Corporation of the benefit of that operation; and therefore, obviously, its directors did not terminate the agency, but continued to recognize and receive the benefit of it, and that corporation cannot now say that because its agent thus suffered by it to pay this interest as a part of the operating expenses of the two roads, ought not to have done so under the contract, it can recover back the money thus paid. It stood by and saw its agent deal with its business in a particular way, having the power to stop it by terminating the agency. Not having done so, it ought not to be permitted to say that what the agent did was not within his authority.

VI. The plaintiff having agreed that the arbitrators to whom the claims made in this suit and other claims were submitted should hear and decide the claims in this suit independently of the other claims, and the arbitrators having upon that agreement heard and decided such claims, is estopped to again set up the claims in this suit.

If the arbitrators had heard and decided all the claims embraced in the submission, it is plain that their decision would estop both parties to afterwards litigate them. The plaintiff's contention, however, is that as the submission was revoked by it before the arbitrators had heard and decided all the claims embraced in it, their decision of the claims which they did hear and decide independently of the others was a nullity and does not estop the plaintiff to again set up the claims. If these claims had been heard and decided independently of the others, by the arbitrators of their own motion, without the agreement of the parties that they should thus hear and decide them, doubtless the decision would work no estoppel. But that was not the case. The arbitrators heard and decided these claims independently of the

others *upon the express request and agreement of the parties that they should do so*, and their decision was understood by them and by the parties to be final and conclusive upon these claims.

Can the plaintiff, after having thus agreed with the defendant that these claims should be heard and decided independently of the others embraced in the submission, now say that that agreement and that decision are of no effect whatever? By every consideration of fair dealing it ought not to be permitted to do so, and it is submitted that the law does not permit it.

The authority of referees appointed under a rule of court is not derived from the agreement of the parties to their appointment, but from the order of the court appointing them, and the parties cannot by subsequent agreement change them or alter in any way the power given them by the order.

Woodbury v. *Proctor*, 9 Gray, 18.

But the authority of arbitrators appointed by agreement of the parties is derived solely from the parties and may be enlarged or modified by their subsequent agreement at any time before it is executed.

An award of arbitrators under a submission by agreement derives its whole force from the agreement of the parties to submit to the arbitrators the matters upon which the award is made. The parties making the submission are estopped by the award to afterwards litigate the matters passed upon in it, simply because they *have agreed* that such matters should be thus passed upon. A partial award is void *simply because the parties have not agreed that the arbitrators should make a partial award.* If a submission should provide by its terms that the arbitrators should hear and decide a part

of the claims submitted independently of others, such hearing and decision of that part would bind the parties as much as a decision of them all.

Suppose in this case the parties had in the original submission requested the arbitrators to hear and decide the claims which they did hear and decide independently of the others before they heard and decided the others, precisely as was done by their subsequent agreement, can there be any doubt that the award of the arbitrators upon these claims would have estopped either party to afterwards litigate them? The award with reference to those claims would have been as conclusive as though they had been the only claims embraced in the submission.

The question before the Supreme Court of Massachusetts was whether the arbitrators had authority to act after one of the parties had revoked and broken the contract of submission and withdrawn from the hearing, not whether they had authority to make a partial award as to independent matters embraced in the submission upon an agreement made before them by the parties that they should make such a partial award.

The question here is whether they had authority to act while the contract of submission was in full force and *in the manner which both parties agreed they should act.* It is not even a case where arbitrators under a general submission of numerous separate claims have heard a portion of them separately, either of their own motion or by request of the parties, and then before they have announced their determination as to the claims they have heard, one of the parties revokes the submission and withdraws, but a case where the parties under a submission of numerous and distinct items of claim have agreed before the arbitrators that certain of the

items shall be heard and *decided* independently of the others, and acting upon this agreement the arbitrators have heard and decided these claims. To say that such a decision made after a hearing and precisely in the manner in which the parties have agreed it should be made depends for its validity upon whether the party against whom the decision is made goes on with the hearing before the arbitrators as to the other matters, is to discourage submissions to arbitration by applying to proceedings under them a rule more strict than has ever been applied, and one which works substantial injustice to the party in whose favor the decision is made, and who has presented his case to the arbitrators upon these items, relying upon the agreement of the other party to submit to their decision upon them.

It is well settled that an agreement to submit to arbitration may be subsequently modified by parol. The same rule applies to the alteration of such an agreement by parol that applies to the alteration of other written contracts by subsequent parol agreement. This principle was distinctly recognized in *Loring* v. *Alden*, 3 Metcalf, 576, although it was decided that no subsequent agreement was proved in that case.

"The parties may make any alteration they may deem requisite in the original submission, and even the terms of an agreement of reference under seal may be changed by a subsequent agreement not under seal, because the agreement subsequent to the original submission is a new agreement incorporating the original submission, and the parties are bound by it."

Stephens' Nisi Prius, 36, citing *Graves* v. *Thomson*, 5 East. 189.

A submission by deed may be altered by parol so as to

submit matters subsequently arising, and an award upon such new matters binds the parties.

Graham v. *Graham*, 9 Penn. State, 254.

A written submission to three persons may be altered by parol agreement to a submission to two of them, and an award by the two is good.

Shockey's Admr. v. *Glasford*, 6 Dana (Ky.) 9.

And a written submission to three may by parol agreement at the hearing be altered to a submission to four, and the award of the four is good.

Blanchard v. *Murray*, 15 Vt. 548.

So a submission by deed to certain persons may by subsequent parol agreement be altered by the substitution of one or more persons in place of arbitrators named in the original agreement.

Stephens' Nisi Prius, 61.
In re Tumes, 2 Nev. & M. 328.

The time limited in a written submission for making the award may be extended by parol agreement and an award made within the extension of time is good, and the remedy upon it is by suit "upon the submission implied in the new agreement."

Bloomer v. *Sherman*, 5 Paige, 575.

"If the parties to a submission in writing do upon the trial before the arbitrators submit by *mutual consent* to the arbitrators matters not included in the written submission, and the arbitrators acting under such mutual consent of the par-

ties do try the matters so verbally submitted and make their award, neither party after publication of the award can object that the award exceeded the submission."

Woods v. *Page*, 37 Vt. 252.

Where a submission authorized the arbitrator to "make one or more awards at his discretion," it was held that an award upon one of the matters submitted was a valid award upon which a suit could be maintained, the court saying, "It cannot be supposed that the separate awards when made were not intended to be binding from the time when they were made. It is impossible to imagine that they were intended to be ambulatory till the last was made."

Wrightson v. *Bywater*, 3 M. & W. 199–207.

Can it be imagined in this case that when the plaintiff and defendant agreed that the arbitrators should hear *and decide* the claims in this suit independently of the other claims submitted they intended such decision should amount to nothing?

Is it to be supposed that when Judge Hoar and Mr. Brooks were presenting to the arbitrators the evidence in support of these claims of the plaintiff upon the defendant, and arguing to them that the plaintiff ought to recover upon them, they did not expect the decision of the arbitrators upon that point to bind the parties? Did they expect that if the arbitrators decided the Nashua Corporation was entitled to recover it would not bind the Lowell to pay?

The only reason why an award as to a part is not good is that the agreement is to submit the whole and not a part.

Can a party who has expressly agreed before the arbitra-

tors that an award may be made as to a part afterwards be heard to say that such an award is not good because it is only as to a part when after such an award as to a part has been made he revokes the power of the arbitrators to award as to the rest of the claims submitted, and thus by his own act deprives the other party of the power to have an award as to the rest? To say this is to say that he may take advantage of his own wrong, and by his breach of his agreement to submit all the matters to the decision of the arbitrators, deprive their decision of a part, made upon his agreement to have it made, of the effect which he has agreed it should have.

VII. As to the liability of the executors of Hocum Hosford and of Charles E. A. Bartlett.

The bill seeks to charge Hosford, who was living when it was brought but has since deceased, and whose executors have appeared and answered the bill, personally for the thirty-one per cent of interest which was paid to defendant out of the share of the net earnings belonging to the plaintiff, from 1875 to 1878, upon the ground that as the joint agent of the plaintiff and defendant it was his duty "to see to it that each party to the contract received its proper share of such net earnings." Record, p. 7.

It also makes Charles E. A. Bartlett, who was the cashier of the joint management, a party, but prays for no relief against him.

As to the liability of Hosford, if any, it is obvious that if the Lowell Corporation is not liable, Hosford is not liable. The record shows no evidence in relation to any liability of Hosford, but shows that he was simply acting in accordance with the votes of the directors of the two corporations, and in any aspect of the case it cannot be held that he was per-

sonally liable to the plaintiff. If there is any liability it is that of the Lowell Corporation, against whom alone any decree to which the plaintiff may be entitled should be entered. The executors of Hosford have filed no brief, and the Lowell Corporation makes this suggestion at their request.

J. H. BENTON, JR.

Office Supreme Court, U. S.
FILED.
DEC 26 1889
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 166.

NASHUA & LOWELL RAILROAD CORPORATION,
Appellant,

v.

BOSTON & LOWELL RAILROAD CORPORATION ET AL.,
Appellees.

SUPPLEMENTAL BRIEF FOR APPELLEES.

BY J. H. BENTON, JR.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 166.

NASHUA & LOWELL RAILROAD CORPORATION,
Appellant,

v.

BOSTON & LOWELL RAILROAD CORPORATION ET AL.
Appellees.

Supplemental Brief for Appellee.

TO WHICH ARE ADDED THE CHARTERS OF THE NASHUA & LOWELL RAILROAD CORPORATION IN NEW HAMPSHIRE, AND THE CHARTER OF THE NASHUA & LOWELL RAILROAD CORPORATION IN MASSACHUSETTS, WHICH WERE OMITTED IN PRINTING THE RECORD.

I.

The following statements made in oral argument are not embraced in the first printed brief for the Lowell Corporation, and are therefore here printed: —

When the partnership contract was made in 1859 the capital of the Nashua Corporation was $620,000, and the capital of the Lowell Corporation $1,800,000.

The partnership contract did not require either party to contribute additional property or capital to the partnership business of operating the two roads together. The division of the net earnings was upon the basis of the *then* earning

capacity of the two properties, which the contract agreed should be worked together.

The gross earnings of the partnership from both properties in 1859 were substantially $730,000 (accurately $729,346). Of this, thirty-one per cent, or substantially $226,000, was derived from the property put into the partnership by the Nashua Corporation.

In 1873, the gross earnings of the partnership from the properties which were *then* operated were substantially $2,000,000 (accurately $980,634.01). Of this, thirty-one per cent, or substantially $620,000, was received by the Nashua Corporation. Record, p. 62.

From its portion of the earnings thus received the Nashua Corporation declared average dividends of ten per cent per annum for the first eighteen years of the contract. Record, p. 291.

The share of the gross earnings which was received by the Nashua Corporation each year increased $395,000 from 1859 to 1873. Assuming operating expenses to have been seventy per cent of the gross earnings, *the annual net earnings received by the Nashua Corporation increased* $118,500 *from* 1859 *to* 1873.

This large increase of gross earnings, and of consequent net revenue to the Nashua Corporation, was due chiefly to expenditures for facilities and accommodations required by the increased business *made at the sole expense of the Lowell Corporation.*

That corporation, the appellee in this suit, expended for additional terminal facilities at Boston, in the construction of the Mystic River Railroad and in improvements at Winchester, $1,478,186. It also expended in the purchase of stock in the Salem & Lowell and Lowell & Lawrence roads, $389,000, making a total of $1,867,186, *or* $67,186 *more than its entire capital when the partnership contract was made.*

It borrowed the money thus expended upon twenty-year seven per cent bonds. Deducting the dividends received on the Salem & Lowell and Lowell & Lawrence stock, the annual interest charge to the Lowell Corporation on the money thus expended for the benefit of the partnership was $116,757, or more than six per cent upon its capital at the commencement of the partnership.

The interest paid from the partnership funds upon these expenditures amounted to $689,245, substantially. Of this, sixty-nine per cent, or $481,159, was borne by the Lowell Corporation, and thirty-one per cent, or $208,086, by the Nashua Corporation, which last sum the Nashua Corporation seeks to recover in this suit.

If we add to the $481,159 of this interest borne by the Lowell Corporation for the benefit of the partnership, the $112,543 which the Lowell Corporation contributed from the earnings of the partnership to repay loss upon the lease of the Peterborough road to the Nashua Corporation, we have $593,702, or *more than thirty per cent of the capital of the Lowell Corporation at the time the partnership was made.*

II.

The answer of the executors of Hosford, found upon page 17 of the Record, and the answer of the Boston & Lowell Railroad Corporation, found upon page 19 of the Record, raise the question whether this bill can be maintained without making the Nashua & Lowell Railroad Corporation of Massachusetts a partner. The same defence was originally made by the demurrers of the defendants, and was overruled in the opinion of the Circuit Court, found on page 404 of the Record.

DEMURRER OF THE BOSTON & LOWELL RAILROAD CORPORATION TO THE AMENDED BILL OF COMPLAINT.

[Filed Nov. 9, 1883.]

The Boston & Lowell Railroad Corporation, one of the defendants named in the complainant's bill of complaint, not confessing any or all of the matters and things in the said bill of complaint as amended to be true in the manner and form therein set forth and alleged, doth demur to said bill as amended, and for cause of demurr showeth: —

First. The plaintiff has not in its said bill of complaint made or stated any case that entitles it to the discovery or relief prayed for, or to any discovery or relief from this defendant as to the matters contained in said bill or any of such matters.

Second. It appears by said bill that the complainant has a full, complete and adequate remedy at law for all the claims, matters and things therein set forth.

Third. It appears by said bill that it is exhibited against this defendant and against the other defendants therein named, for distinct matters and causes, in several of which this defendant is in no wise interested or concerned either severally or jointly with the other defendants or either of them, and that said matters and causes are in no wise dependent upon each other, and that the bill is altogether multifarious.

Fourth. It appears by said bill that the defendants, Charles E. A. Bartlett and Hocum Hosford, are not, either together or separately, liable, interested or concerned with this defendant in any cause of action, matter or thing charged against this defendant; and that they are wrongfully and improperly joined and made parties defendant with this defendant.

Fifth. In said bill, the complainants pray that certain interrogatories shall be answered and certain discoveries made personally by Josiah G. Abbott, who is alleged to be president of this defendant corporation, although said Abbott is not made a party to the bill; and certain discoveries are asked for from said Abbott and this defendant by the complainant, who at the same time expressly waives the oath to the answers in which the discoveries asked for are to be made.

Sixth. It does not appear in said bill that the complainant has any separate interest or any interest in the contract or agreement set forth in the bill under and by virtue of which alone it is sought to charge this defendant in this cause and to enforce which alone this bill is exhibited.

Seventh. It appears in said bill that, if the plaintiff has any interest in the agreement or contract set forth in the bill, it has such interest jointly with the Nashua & Lowell Railroad Corporation, a corporation chartered by the laws of the Commonwealth of Massachusetts, and a citizen of said Commonwealth; that said last-named corporation is a necessary party plaintiff in this bill; that said last-named corporation is not joined in this bill, and that discovery and relief prayed for in the bill cannot be decreed, if at all, until said last-named corporation is joined with the complainant.

Eighth. The interrogating part of the bill is not drawn in accordance with rules of this court and is wholly informal.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to said bill of complaint, and prays to be hence dismissed with its costs and charges in this behalf sustained.

S. A. B. ABBOTT,
Of Counsel for Defendant Corporation.

I certify that the above demurrer is well founded in point of law. S. A. B. ABBOTT,
Of Counsel.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.
BOSTON, Nov. 8, 1883.

Then personally appeared Josiah G. Abbott, and made oath that he is president of the Boston & Lowell Railroad Corporation, and that the above demurrer is not interposed for delay, before me.

Witness my hand and notarial seal the day and year last above written.

[SEAL] GEO. A. SAWYER,
Notary Public.

III.

The legislation in New Hampshire and Massachusetts constituting the Nashua & Lowell Corporation is as follows: —

FIRST: CHAPTER 37, NEW HAMPSHIRE LAWS, 1835.

AN ACT TO INCORPORATE THE NASHUA AND LOWELL RAILROAD CORPORATION.

Be it enacted, etc.:

SECTION 1. That Jesse Bowers, Ira Gay, Daniel Abbot, Benjamin F. French, John M. Hunt, Peter Clark and Charles J. Fox, their associates, successors and assigns, be and hereby are constituted and made a corporation by the name of the Nashua and Lowell Railroad Corporation; and by that name may sue and be sued, prosecute and defend to final judgment and execution, and may have and use a common seal, and the same may alter and renew at pleasure; and may also make, ordain and put in execution all such by-laws and regulations (not being contrary to the constitution and laws of this State) as shall be necessary, proper and convenient for the government of said corporation, the due management of its concerns and the preservation and proper use of said railroad; and shall be and hereby are vested

with all the powers and privileges, and subject to all the liabilities, which by law are incident to corporations of a similar nature.

SECT. 2. That said corporation be and hereby is empowered to locate, canstruct, and keep in repair a railroad from any point in the southern line of the State to some convenient place in or near Nashua village in Dunstable, in such manner as they shall deem most expedient, and to take toll for all passengers and property of all descriptions conveyed upon the same or any part thereof; and for this purpose may lay out said railroad not exceeding six rods wide, and may take as much more land as may be necessary for stone and gravel, for embankments, cuttings, walls, bridges, and abutments for the proper construction of said railroad; provided, that all damages occasioned by taking the same shall be determined in the manner hereinafter provided; and that the transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads, and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations, and provisions as the directors shall from time to time prescribe and direct.

SECT. 3. That said corporation be and is hereby authorized, for the purposes aforesaid, to purchase, take, hold, improve and convey real and personal estate of every kind, and to erect thereon such depots, storehouses, toll-houses and other buildings, as they may think expedient, to such amount as they may find sufficient for the completion of said railroad and the management of its concerns; provided, said amount shall not exceed three hundred thousand dollars.

SECT. 4. That the said Jesse Bowers, Daniel Abbot, and Ira Gay, or any two of them, may call the first meeting of said corporation, by giving to each of the members seven days' previous notice, at which meeting a clerk shall be chosen, who shall be sworn to the faithful discharge of the duties of his office, and it shall be his duty to record the doings and proceedings of said corporation, and to perform such other services as the by-laws of said corporation may require. And at the same or any subsequent meeting, duly holden, the members of said corporation may prescribe the time and manner of calling, holding and managing future meetings; may divide the capital stock, or such portion thereof as they may deem sufficient for the time being, into shares, and prescribe the mode in which the same shall be holden and transferred; may make or provide for the making of assessments on said shares, from time to time as occasion may require; provided, that assessments shall not exceed in the whole the sum of twenty-five dollars on each share, and fix the time and mode of payment; may appoint and constitute such officers, servants or agents of the said corporation as they shall think expedient, and prescribe their respect-

ive duties and powers; and may do or transact any other matter or thing relating to the property, business or concerns of said corporation. And each member shall be entitled to one vote for each share he owns or holds in said corporation, and absent members may be represented and vote by proxy, authorized thereto by writing filed with the clerk of said corporation; and all questions shall be decided by a majority of votes cast; provided, that no vote shall be given by any proprietor for any share owned or held by him exceeding one tenth of the whole number of shares.

SECT. 5. That the shares aforesaid shall be liable and holden for the payment of all assessments legally made thereon; and in case of the neglect and refusal of any member to pay the assessment or assessments on his share or shares, the same, or so many of them as may be sufficient to pay the amounts of such assessments, with interest and expenses of sale, may be sold and transferred for the payment of the same in such manner as may be prescribed by the by-laws of said corporation; provided that it be necessary to raise a sum exceeding twenty-five dollars on each share, the same shall be done by creating new shares.

SECT. 6. That when the lands or other property of any feme-covert, infant, spendthrift, or person *non compos mentis* shall be necessary for the construction of said railroad, the husband of such feme-covert, or the guardian of such infant, spendthrift, or person *non compos mentis* may release all damages for any land or property taken and appropriated as aforesaid, as fully as they might do if the same were holden in their own rights respectively.

SECT. 7. That said corporation shall be holden to pay all damages arising to any person or corporation by taking their land for said railroad, when it cannot be obtained by voluntary agreement, on petition to the court of common pleas, in the mode provided by law for the recovery of damages, occasioned by the laying out of highways by order of said court.

SECT. 8. That said corporation be and hereby is authorized to cross any canal, or to cross, raise, lower or run along any turnpike, highway or other way; provided, that said railroad shall be so constructed as not to obstruct the safe and convenient use of the same; and if said railroad shall not be so constructed, the proprietors of such canal or turnpike, the owner of such private way, or the selectmen of the town in which such highway may be situated, as the case may be, shall be entitled to an action on the case against said corporation and may recover reasonable damages; provided, however, that the proprietors, owners or selectmen aforesaid, as the case may be, shall, before action brought, file with the clerk of said corporation a

particular description in writing, signed by them, of all such alterations as they may deem necessary, and shall specify therein, and allow a reasonable time to said corporation for making said alterations; and provided further that no action shall be sustained, as aforesaid, unless brought within one year after the time allowed for making such alterations shall have expired.

SECT. 9. That said corporation shall substantially construct and keep in good repair all bridges, abutments, foundations, walls and embankments which may be necessary for safely and conveniently crossing any canal, or crossing, passing over, under or along any turnpike, highway or other way; and when any public highway shall hereafter be laid out by the selectmen of any town, or by order of the court of common pleas, across said railroad, said corporation, being thereto required in writing by the selectmen of the town where such highway may cross said railroad, shall make such alterations in said railroad as may be necessary to the proper construction of said highway and the convenient and safe use thereof, and the same constantly maintain and keep in repair, and in default thereof shall be liable in damages to the party injured, and also to prosecution by indictment and fine, to the use of the county wherein such default may take place, at the discretion of the court before whom the same may be tried.

SECT. 10. That no other railroad shall be granted, within thirty years from the completion of the railroad granted in this act, running parallel with, or which is a substitute for the same, or any part thereof, within five miles of the same; provided, however, that any railroad may be granted running to meet the railroad granted in this act at its termination, anything herein contained to the contrary notwithstanding; and provided, further that if the location of said railroad be not filed with the Secretary of State on or before the first day of July in the year of our Lord one thousand eight hundred and thirty-six, or if said railroad shall not be commenced and the sum of four thousand dollars have been laid out and expended on the same, within three years from and after the passage of this act, or if the same shall not be completed so that passengers and property may and shall be conveyed on the same within five years from this time, then this act shall be null and void.

SECT. 11. That if any person shall wilfully, maliciously or wantonly and contrary to law obstruct the passage of any engine or carriage upon said railroad, or in any way injure or destroy said railroad, or any part thereof, he, she or they, or any person aiding or abetting in such trespass, shall forfeit and pay to said corporation for every such offence treble such damages as shall be proved, to be sued for and

recovered before any court proper to try the same. And such offender shall be liable to indictment by the grand inquest for the county in which such trespass shall have been commited, or any offence aforesaid, and on conviction thereof shall pay a fine not exceeding five hundred dollars nor less than thirty dollars, for the use of said county, or may be imprisoned for a term not exceeding one year, at the discretion of the court before whom such conviction may be had.

SECT. 12. That said corporation be and hereby is authorized to extend said railroad from its termination at the southern line of this State into and through the Commonwealth of Massachusetts, to meet the Boston and Lowell Railroad, whenever said Commonwealth will empower said corporation so to do, with such powers, liabilities and restrictions as may be deemed expedient; and for this purpose said corporation may increase their capital stock and create new shares as said Commonwealth may authorize them to do.

SECT. 13. That the Legislature may authorize any company to enter with another railroad at the termination of said Nashua and Lowell Railroad, at Nashua village in said Dunstable, or between the factories of the Jackson Company in said Dunstable and Merrimac River, paying for the right of using the same, or any part thereof, such a rate of toll as the Legislature may from time to time prescribe, and complying with such rules and regulations as may be established by said Nashua and Lowell Railroad Corporation; and that it shall be the duty of the directors of said company, from year to year, on or before the second Wednesday of June, verified by the affidavit of at least two of them, to make a report to the Legislature of their acts and doings, receipts and expenditures, under the provisions of this act; and their books shall at all times be open to the inspection of any committee of the Legislature appointed for that purpose. And if said corporation shall unreasonably neglect or refuse to make such report at the expiration of every year after the opening of said railroad, for every such neglect or refusal they shall forfeit and pay to the use of the State a sum not exceeding five thousand dollars, to be recovered by action or indictment in any court of competent jurisdiction.

SECT. 14. That if, after the expiration of five years from and after the completion of said road, the net income or receipt from tolls and other profits, taking the five years aforesaid as the basis of calculation, shall have amounted to more than ten per cent per annum upon the cost of the road, the repairs and all expenses incident thereto, the Legislature may take measures to alter and reduce the rate of tolls and other profits in such manner as to take off the overplus for the next five years, calculating the amount of transportation upon the road to

be the same as the five preceding years, and at the expiration of every five years thereafter the same proceedings may be had; provided that it shall be in the power of the State, at any time during the continuance of the charter hereby granted after the expiration of twenty years from the opening for use of the railroad herein provided to be made, to purchase of the said corperation the said railroad and all the franchise, property, rights and privileges of said corporation, by paying to said corporation a sum equal in amount to their capital expended, with such further sum, after deducting the net income by them received, as shall make their net income equal to ten per cent on said capital annually.

SECT. 15. That nothing in this act contained shall prevent the Legislature from granting any charter for a company to construct a railroad commencing at the southerly line of the State, in either of the towns of Hudson, Pelham or Salem, to run thence northwardly to Concord; provided such railroad shall be laid out and constructed on the east side of Merrimac River, as far northwardly as Amoskeag village, in Goffstown.

SECT. 16. That nothing in this act shall be so construed as to affect the rights of any railroad corporation heretofore granted, and that the Legislature of this State may at any time hereafter alter, amend or modify this act or any of its provisions.

Approved June 23, 1885.

SECOND: CHAPTER 249, MASSACHUSETTS LAWS, 1836.

AN ACT TO ESTABLISH THE NASHUA AND LOWELL RAILROAD CORPORATION.

Be it enacted, etc.:

SECTION 1. That Jesse Bowers, Ira Gay, and Daniel Abbott, their associates and successors, are hereby made a corporation by the name of the Nashua and Lowell Railroad Corporation, with all the powers and privileges, and subject to all the duties, liabilities and provisions contained in that part of the thirty-ninth chapter of the Revised Statutes, passed November the fourth, in the year one thousand eight hundred and thirty-five, which relates to railroad corporations, and in the forty-fourth chapter of said Revised Statutes; and said corporation is hereby authorized and empowered to locate, construct and finally complete a railroad from Lowell, in the county of Middlesex, to form a junction with portion of said Nashua and Lowell Railroad, lying within the State of New Hampshire; the proposed railroad commencing and pursuing the course following, viz.: commencing at the

western termination of the straight line near the car house of the Boston and Lowell Railroad: thence passing along the northern bank of the canal, about eighteen hundred feet, to a point a little westerly of the bridge over the same; thence westerly, curving a little to the north, about one hundred and seventy rods, to a point in said canal, about forty rods south of the guard locks; thence crossing said canal, and running westerly in the same direction, curving slightly to the south, about two hundred and fifty-six rods, to a point about ten rods south of Black Brook, crossing the highway about forty rods east of Whitney's house; thence westerly, crossing Black Brook, and continuing a straight line about one hundred and twenty rods, to the second lock of the locks at the head of Middlesex Canal; thence crossing said lock, and passing along near the south bank of Merrimac River, about one mile, to the margin of the Merrimac, at the hill, about ninety-five rods east of Stony Brook; thence curving gradually to the north, to a point near the mouth of said brook; thence crossing said brook, and curving gradually to the south, about three hundred and sixty-six rods, to the Middlesex turnpike gate; thence passing near the eastern side of said turnpike, about two miles, to a point near the head of said turnpike; thence curving to the south, on the southern bank of the Merrimac, to the mouth of Biscuit Brook; thence curving northerly, and passing up the westerly bank of the Merrimac to the mouth of Butterfield's Brook; thence passing said brook, and leaving said bank, and curving gradually to the west, round the brow of the ridge, across the Horse-shoe Bend, about one mile and one hundred rods, to the mouth of Howard's Brook; thence crossing the same near its mouth, and running along the bank of the Merrimac, to the northern line of the State, so as to unite with that part of the Nashua and Lowell Railroad lying within the State of New Hampshire; or the said corporation may commence their road at some convenient point near the Boston and Lowell Railroad, south of the Patucket Canal, and run near the margin of said canal, till they meet the line before described.

SECT. 2. The capital stock of said corporation shall consist of a sum not exceeding three hundred thousand dollars to be divided into shares of one hundred dollars each; and said corporation may purchase and hold such real estate as may be necessary for a depot and other purposes connected with the use of said road.

SECT. 3. Said corporation are hereby authorized to enter with their railroad on that point of the Boston and Lowell Railroad designated in the first section of this act, or within thirty rods in either direction from said point, paying for the right to use the same, or any part thereof, such a rate of toll as the Legislature may from time to

time prescribe, and complying with such rules and regulations as may be established by said Boston and Lowell Railroad Corporation, by virtue of the fifth section of their act of corporation; provided, however, that it shall be the duty of the corporation hereby created to enter the said Boston and Lowell Railroad by such proper turnouts or switches as will not unreasonably incommode the travel upon the said Boston and Lowell Railroad, and pay all the expenses incident to and in consequence of any alterations necessary in said Boston and Lowell Railroad, to enable them to enter upon it in a proper manner.

SECT. 4. If the amount of stock of said railroad shall not have been subscribed for, the corporation organized and the location of the road filed with the county commissioners of the county of Middlesex previous to the first day of January in the year one thousand eight hundred and thirty-seven; or if said corporation shall fail to completed said road on or before the first day of September in the year one thousand eight hundred and thirty-eight, this act shall be void.

SECT. 5. Nothing contained in this act shall authorize said corporation to erect any pier or other obstruction in the Patucket or Middlesex Canal, and if they construct their railroad across either of said canals they shall not in any way obstruct the safe and convenient use of said canals.

SECT. 6. The Legislature may, after the expiration of four years from the time when this railroad shall be open for use, from time to time, alter or reduce the rate of tolls and other profits upon said road, but the said tolls shall not, without the consent of said corporation, be so reduced as to produce with said profits less than ten per cent per annum.

Approved April 16, 1836.

THIRD: CHAPTER 21, NEW HAMPSHIRE LAWS, 1838.

AN ACT TO UNITE THE NASHUA AND LOWELL RAILROAD CORPORATIONS OF MASSACHUSETTS AND NEW HAMPSHIRE, AND FOR OTHER PURPOSES.

SECTION 1. *Be it enacted, etc.* That the two corporations, under the name of the "Nashua and Lowell Railroad Corporation," one of which charters was granted by the Legislature of this State, the twenty-third day of June, one thousand eight hundred and thirty-five, and the other by the Legislature of the Commonwealth of Massachusetts, the sixteenth day of April, one thousand eight hundred and thirty-

six, are hereby authorized, from and after the time when this Act shall take effect, to unite said corporations; and all the tolls, franchises, rights, powers, privileges and property of the said two corporations shall be held and enjoyed by the stockholders in each and both, in proportion to their number of shares therein. And from and after the time said corporations shall be united, all property owned, acquired or enjoyed by either of said corporations shall be taken and accounted to be the joint property of the stockholders, for the time being, of said two corporations.

SECT. 2. That from and after the time said corporations shall be united, all the stockholders shall be entitled to the same notice, and shall enjoy the same right of voting. And all meetings shall be warned and held by the associated stockholders pursuant to the by-laws of said corporations, and such meetings shall be legal to choose all officers of said corporation and to transact any other business which other railroad corporations might of right do: *provided always*, that there shall be at least one officer in each State, who is an inhabitant thereof, on whom process against said corporation may be served, and that the books and registry of one corporation shall be taken to be the books and registry of the other corporation.

SECT. 3. That the share or shares of any stockholder in said company shall be liable to attachment and execution, in the State where such stockholder, at the time of such attachment or execution, shall reside, or inhabit: *provided always*, that a true and attested copy of such attachment or execution shall be left, at the time of service, by the officer serving the same, with the clerk, or any director of said corporation, or at his usual place of abode, in the State where such attachment or execution shall be served.

SECT. 4. That the said corporation shall keep separate accounts of the expenses which have arisen, or shall arise in construction of the portions of said railroad situated in the State of Massachusetts and New Hampshire respectively, and of all the expenses which would have properly belonged to the respective corporations, as if this act had not been passed, until the same shall be completed in both States. And there shall be two commissioners appointed, who shall hold their offices for the term of four years, whose duty it shall be to ascertain what proportion of the expenditures on said railroad and of the other expenses attending its construction and maintenance, also what proportion of the receipts and profits of said railroad shall properly appertain and belong to the portions of said railroad situated in said two States. And the annual report, which shall be made to the Legislature of this State, in pursuance of the laws of this State relating thereto, shall be approved by said commissioners. And the

governor of each of said States shall appoint one commissioner, who shall execute the duties prescribed by this act, and who shall receive from said corporation a reasonable compensation for their services.

SECT. 5. That whereas the Legislature of the Commonwealth of Massachusetts have passed a subsisting act, substantially similar, uniting said two corporations, this act shall be in force when the same shall have been accepted by the stockholders of each and both said corporations, at a meeting to be called for that purpose; at which meeting said stockholders may vote to ratify and render valid, in the united corporations, all former proceedings which would have been valid in said corporations respectively; and the same shall be as binding on the united corporations as if adopted separately by each.

SECT. 6. That the said corporation, so far as their road is situated in this State, when united by virtue of the provisions of this act, shall be subject to the general laws of this State, to the same extent as said corporation would have been if this act had not been passed.

SECT. 7. That after said corporations shall be united, according to the provisions of this act, they shall be one corporation, by the name of the Nashua and Lowell Railroad Corporation; and all the acts of said corporations, which are valid in said corporations severally, shall be valid in the united corporation.

SECT. 8. That said corporation shall have power, and they are hereby authorized, to alter and amend the location of their road, so far as the same lies north of Nashua River, subject to all the liabilities contained in their original charter; provided, such location be made, and such amended alteration filed in the office of the Secretary of State on or before the first day of September next. And so much of the tenth section of an act entitled "An Act to incorporate the Nashua and Lowell Railroad Corporation," as requires the filing of the location of their road with the Secretary of State on or before the first day of July, A. D. 1836, shall be, and is hereby repealed, so far as relates to that portion of said road lying north of Nashua River, as before mentioned.

SECT. 9. That the Legislature of this State may at any time hereafter so alter, amend or modify this act, or any of its provisions, as the public good may require.

Approved June 26, 1838.

FOURTH: CHAPTER 96, MASSACHUSETTS LAWS, 1838.

AN ACT TO UNITE THE NASHUA AND LOWELL RAILROAD CORPORATIONS OF MASSACHUSETTS AND NEW HAMPSHIRE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The stockholders of the Nashua and Lowell Railroad Corporation, incorporated by the Legislature of the State of New Hampshire in the year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the Nashua and Lowell Railroad Corporation, incorporated by the Legislature of this Commonwealth in the year one thousand eight hundred and thirty-six; and the said two corporations are hereby united into one corporation by the name of the Nashua and Lowell Railroad Corporation; and all the tolls, franchises, rights, powers, privileges and property granted or to be granted, acquired or to be acquired, under the authority of the said States, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said corporations.

SECT. 2. The said stockholders shall hold their meetings, make their by-laws, appoint their officers and transact all their business as one corporation; *provided*, that one or more of the officers of said corporation shall be a resident in this Commonwealth, and one or more of them in the State of New Hampshire, on whom process against said corporation may be legally served, in either State, and that said corporation shall be held to answer in the jurisdiction where the service shall be made and the process is returnable.

SECT. 3. The share or shares of any stockholder in said corporation shall be liable to attachment and to be taken on execution in the State where such stockholder shall reside at the time of the service of the process; *provided*, that an attested copy of the writ of execution and of the officer's return shall, at the time of the service, be left with the clerk or a director of the corporation, or at his usual place of abode, by the officer making the service.

SECT. 4. The said corporation shall so make out and keep an account of the expenditures on said road from its commencement to its completion, as clearly to exhibit what portion thereof belongs to that part of said road situated in Massachusetts, and what portion to that part in New Hampshire.

And two commissioners shall be appointed, one by the governor of each State, to hold their offices for the term of four years, and to be reasonably compensated for their services by said corporation, who shall ascertain what proportion of expenditures on said road, and of the other expenses attending its construction, maintenance and use, also what proportion of the receipts and profits of said railroad shall properly appertain and belong to the portions of said road in each State respectively. And the annual report required to be made by the directors to the Legislature of this Commonwealth shall be approved by the said commissioners.

SECT. 5. The said corporation, so far as their road is situated in Massachusetts, shall be subject to the general laws of the State to the same extent as the Nashua and Lowell Railroad Corporation, established by its Legislature in the year one thousand eight hundred and thirty-six, would be if this act had not been passed.

SECT. 6. This act shall not take effect until the Legislature of the State of New Hampshire shall have passed an act similar to this, uniting the said stockholders into one corporation, nor until said acts have been accepted by the said stockholders at a meeting duly called for that purpose, at which meeting the said stockholders may ratify and confirm all or any of their former doings, and adopt them as the acts and proceedings of the said united corporation.

Approved by the Governor, April 10, 1838.

J. H. BENTON, JR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 166.

NASHUA & LOWELL R. CORPORATION, Appellant,

vs.

BOSTON & LOWELL R. CORPORATION ET AL., Appellees.

In Equity.

Appeal from the Circuit Court of the U. S. for the District of Massachusetts.

Brief for Boston & Lowell Railroad Corporation on the Question of the Jurisdiction of the Circuit Court.

J. H. BENTON, Jr.,
Counsel for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 166.

NASHUA & LOWELL RAILROAD CORPORATION,
Appellant,

v.

BOSTON & LOWELL RAILROAD CORPORATION ET AL.,
Appellees.

BRIEF FOR BOSTON & LOWELL RAILROAD CORPORATION

ON THE QUESTION OF THE JURISDICTION OF THE CIRCUIT COURT.

STATEMENT OF FACTS.

June 23, 1835, the legislature of New Hampshire constituted certain persons a corporation in that state by the name of the Nashua & Lowell Railroad Corporation, and April 16, 1836, the legislature of Massachusetts constituted the same persons a corporation in that state by the same name, each corporation being authorized to build that portion of a railroad between Nashua, N. H., and Lowell, Mass., lying in the state by which the corporation was created.

April 10, 1838, the legislature of Massachusetts passed an act to unite the Nashua & Lowell Railroad Corporations of Massachusetts and New Hampshire, the first section of which was as follows: —

"The stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the Legislature of the State of New Hampshire in the year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the Legislature of this Commonwealth in the year one thousand eight hundred and thirty-six; and *the said two corporations are hereby united into one corporation by the name of the Nashua & Lowell Railroad Corporation;* and all the tolls, franchises, rights, powers, privileges and property granted or to be granted, acquired or to be acquired, under the authority of the said states, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said corporations."

The act further provided that said stockholders should "hold their meetings, make their by-laws, appoint their officers, and prosecute all their business *as one corporation*," with the single proviso that one at least of the officers of the corporation should be a resident in the state, on whom processes against the corporation might be served, and the corporation held to answer upon such service. The act also provided that the shares "in said corporation" should "be liable to attachment and execution in the state where the shareholder resided"; that the corporation should keep accounts of its expenditures, showing what part thereof was expended on the road in each state, and what proportion of the receipts and profits of the entire railroad property appertained and belonged to the portions of it in each state; and also that the said corporation, so far as its road was situated in Massachusetts, should be subject to the general laws of that state to the same extent as the original corporation created in that state would have been if the act of union had not been passed.

The act further provided that it should not take effect

until the legislature of New Hampshire had passed a similar act "*uniting the said stockholders into one corporation*, nor until the said acts had been accepted by the said stockholders [that is, the stockholders of both companies], at a meeting called for that purpose."

June 26, 1838, the legislature of New Hampshire passed a substantially similar act, providing that after the corporation should have accepted the act and voted to unite, "*they shall be one corporation by the name of the Nashua & Lowell Railroad Corporation.*"

These acts are contained in the original transcript of record from the Circuit Court, and are printed in the appendix to this brief, p. 28. *Et. Seq.*

This corporation issued common stock and constructed its road from Nashua to Lowell, there connecting with the road of the Boston & Lowell Railroad Corporation, extending from Lowell to Boston, and it has ever since acted as one corporation in the operation of its road, and in all other respects. In 1857 it made a contract with the Boston & Lowell Railroad Corporation for the joint operation of the roads of the two companies. The character of the two corporations, parties to that contract, is set forth in the first clause thereof, as follows: —

> "This indenture, made this twenty-ninth day of January A. D. 1857, between the Boston & Lowell Railroad Corporation, a corporation duly established by the laws of the State of Massachusetts, of the first part, and the Nashua & Lowell Railroad Corporation, *a corporation duly established by the laws of the states of Massachusetts and New Hampshire*, of the second part, witnesseth:"
>
> Record, page 9.

This suit is brought by the Nashua & Lowell Railroad Corporation as a party to that contract, in the Circuit Court

for the district of Massachusetts, against the Boston & Lowell Railroad Corporation, a citizen of Massachusetts, and in respect to transactions which occurred in the joint operation of the roads of the parties thereto.

The allegation of the bill is that the plaintiff corporation exists under the laws of the state of New Hampshire, and is a citizen of said state, "owning a railroad extending from Nashua, New Hampshire, to Lowell, in Massachusetts."

Record, page 1.

The original bill was filed April 17, 1880, and contained the same allegation. Appendix to this brief, p. 21.

June 14, 1880, the defendant pleaded to the jurisdiction, alleging that the complainant was a citizen of Massachusetts.

May 31, 1880, the complainant amended the bill by adding as parties plaintiff certain shareholders of the Nashua & Lowell Railroad Corporation, who were citizens of New Hampshire. Appendix, p. 21.

July 19, 1880, the defendants pleaded to the jurisdiction of the amended bill, alleging that the Nashua & Lowell Railroad Corporation was a citizen of Massachusetts, and not solely a citizen of New Hampshire. Appendix, p. 22.

August 27, 1881, this plea was overruled in an opinion by NELSON, D. J. Appendix, p. 23.

September 30, 1882, the claims made in the original bill were referred to arbitration, and the proceedings before the arbitrators, shown by the record, were then had. Record, pp. 28, 42.

September 15, 1883, the plaintiff amended its bill, striking out the names of the shareholders in the Nashua & Lowell Railroad Corporation who were citizens of New Hampshire, and making it simply a bill by that corporation as a citizen of New Hampshire against the Boston & Lowell

Railroad Corporation, a corporation in Massachusetts, and certain natural persons, also citizens of Massachusetts.

Record, page 1.

November 9, 1883, a demurrer was filed to this amended bill, specifying among other causes that if the plaintiff has any interest in the contract set forth in the bill, it has it jointly with the Nashua & Lowell Railroad Corporation, chartered by the laws of Massachusetts, which is a necessary party plaintiff to the bill. Appendix, p. 26.

This demurrer was overruled in another opinion by NELSON, D. J., upon the ground that the Nashua & Lowell Corporation in New Hampshire and the Nashua & Lowell Corporation in Massachusetts "are so far identical, that they represent each other in suits by or against either of them, and the judgments or decrees will bind *the whole corporation*," meaning, of course, the consolidated or united corporation under the laws of New Hampshire and Massachusetts.

Opinion of Circuit Court, Record, page 435.

The defendants then answered and set forth the legislation under which the plaintiff corporation was created in New Hampshire and Massachusetts, and alleged that the contract was made by the plaintiff as a corporation created by the laws of the two states, and not by it as a corporation existing under the laws of New Hampshire.

Record, pages 19, 20.

The cause was then heard upon the pleadings and evidence, and the final decree was for the defendant, dismissing the bill upon the merits. The cause is brought to this

court upon appeal by the plaintiff. The question is whether, upon these facts, the Circuit Court had jurisdiction of the cause.

ARGUMENT.

I.

The plaintiff is clearly a corporation of both Massachusetts and New Hampshire.

There can be no doubt that it was the intention of the legislatures of Massachusetts and New Hampshire to create a new corporation which should owe its existence to the acts of union in each state.

> Railroad Company *v.* Georgia, 98 U. S. 359.
> Memphis & C. R. R. Co. *v.* Alabama, 107 U. S. 581.

The New Hampshire act provides that the original corporations "shall be one corporation by the name of the Nashua & Lowell Railroad Corporation." The Massachusetts act provides that the "stockholders of the two corporations are hereby united into one corporation, by the name of the Nashua & Lowell Railroad corporation."

Each act speaks of the united corporation as one corporation, and provides that there shall be in each state at least one officer, an inhabitant thereof, on whom process against "said corporation may be served"; that the shares of any stockholder "in said company" shall be subject to attachment and execution.

Each provides that the stockholders of the united corporation "shall hold their meetings, make their by-laws, appoint their officers, and transact all their business as one corporation."

Each provides that "*said corporation* shall be subject to

the general laws of each state, so far as their road is situated therein."

The larger part of the road to be built by the united corporation was in Massachusetts, and the legislation of that state cannot possibly be treated as giving a mere license to the New Hampshire corporation to exercise in Massachusetts corporate powers conferred upon it by New Hampshire, as was held to be the case in Pennsylvania Company *v.* St. Louis, etc., Railroad, 118 U. S. 290, 296, and in Goodlett *v.* Louisville Railroad, 122 U. S. 391, 410.

Besides, unless the Nashua & Lowell Railroad Corporation is one corporation in both states, the decree in this cause will not bind it in Massachusetts, unless it is made a party plaintiff, in which case the Circuit Court would have no jurisdiction. If the cause of action set out in the bill does not belong to the plaintiff as a corporation in both states, but to two distinct corporations by the same name, then it belongs to those corporations jointly, and either is a necessary party plaintiff with the other to any suit upon it.

Under the legislation by which certain persons were first created distinct corporations in the two states, and afterwards authorized by both states to unite and form one corporation with identity of shareholders, identity of property, and identity of directors and officers, the corporation thus created had an indivisible franchise to own and operate the whole line of road between Lowell and Nashua.

Muller v. *Dows*, 94 U. S. 444, 449.

A contract or obligation by it in one state, as distinct from a contract or obligation by it in the other, became a legal impossibility. Its directors and agents were of necessity the same in both states, and any obligation or contract incurred by the action or non-action of such directors or

agents was necessarily a liability of the corporation in both states.

Railroad Company v. *Harris*, 12 Wall. 65, page 85.

The corporation, though made up of two distinct corporations chartered by the legislatures of Massachusetts and New Hampshire, "had a capital stock which was a unit, and only one set of shareholders, who had an interest by virtue of their ownership of shares of such stock in all of its property everywhere. In its organization and action and the practical management of its property it was one corporation, though in its relations to each state it was a separate corporation governed by the laws of that state as to its property therein."

Graham v. *Boston, Hartford & Erie R. R.*, 118 U. S. 161, 169.

It was "in truth a single corporation with the powers of two."

Covington, etc., Bridge Co. v. *Mayer*, 31 Ohio St. 317, 325.

Binney's Case, 2 Bland. 99, 147.

State v. *Northern Cent. R. R.* 18 Md. 193, 213.

Quincy Br. Co. v. *Adams County*, 88 Ill. 615.

Chicago, etc., R'w'y v. *Auditor*, 53 Mich. 79.

Mississippi Valley Co. v. *Chicago, etc., R. R.* 58 Miss. 846.

State v. *Metz*, 32 N. J. 199.

Horne v. *B. & M. R. R.* 62 N. H. 454.

The question of jurisdiction in this case is, therefore, simply whether a corporation existing under the laws of Massachusetts and New Hampshire, and which *is* a corporation in Massachusetts, can be treated in Massachusetts, for

the purpose of giving jurisdiction to the United States Circuit Court for the District of that state, as *not* being a corporation of that state.

Stated in another form, the question is, whether the shareholders of a corporation existing under the laws of two states, and having but one set of shareholders, can, for the purpose of giving jurisdiction to the Circuit Court for one of the states, be assumed to be *all citizens of the other state?*

To state this question, is to answer it in the negative, and it is thus answered by all the decisions of this Court which are in point.

Stated in order of time these decisions are as follows: —

Ohio & Mississippi R. R. *v.* Wheeler, 1 Black, 286, decided in 1861.

Railway Company *v.* Whitton, 13 Wall. 270, decided in 1874.

Muller *v.* Dows, 94 U. S. 444, decided in 1876.

And Memphis & Charleston Railroad *v.* Alabama, 107 U. S., decided in 1882.

In *Ohio & Mississippi R. R. Co.* v. *Wheeler*, the declaration stated that the plaintiffs were "a corporation created by the laws of the states of Indiana and Ohio, and that the defendant was a citizen of said state of Indiana"; that is to say, it stated *exactly what the proof shows to be the fact as to the creation of the plaintiff corporation, and the citizenship of its shareholders in this case*, and it was held that the suit must be treated as one in which citizens of Ohio and Indiana were joined as plaintiffs in an action against a citizen of Indiana, and therefore the action could not be maintained.*

* The Supreme Court of Pennsylvania followed this decision in *Alleghany* v. *Cleveland etc. Railroad*, 51 Penn. St 228, decided in 1865, where it appeared that the defendant company had been incorporated first by the

In *Railway Company* v. *Whitton*, Whitton, a citizen of Illinois and administrator of the estate of his wife in Wisconsin under letters of administration granted in that state, sued the Chicago & Northwestern Railway Company in the state court of Wisconsin, to recover damages for the death of his wife, under the statute of Wisconsin. After issue was joined in the state court, the plaintiff petitioned for the removal of the cause to the Circuit Court, on the ground that he was a citizen of Illinois and the defendant a corporation under the laws of Wisconsin.

The railway company opposed the petition, and showed by affidavits that it was a corporation created under the laws of the states of Illinois, Wisconsin and Michigan, having an entire line of railroad, and exercising all its powers and franchises by one board of directors. The petition was granted and an order for removal made by the local state court, which order was, upon appeal of the railway company, reversed by the Supreme Court of the state. The Circuit Court, however, took jurisdiction, and upon error to reverse the final judgment for the plaintiff, this court held that the railway company must, for the purposes of suit in Wisconsin, be regarded as a Wisconsin corporation, and that the fact that it was also a corporation under the laws of Illinois did not prevent the plaintiff, as a citizen of Illinois, from treating it as a citizen of Wisconsin, for the purpose of removing the suit to the Circuit Court for that state.

In brief, the decision was, that as the corporation was a corporation under the laws of Wisconsin, it could not *there* be treated as a corporation or citizen of another state, but

state of Ohio and then by Pensylvania, saying that a suit against such a corporation must be held to be a suit against citizens of the two states "who have united themselves in business under the shadow of the corporate name," and as some of them are citizens of the same state as the plaintiff, the Federal court has not jurisdiction.

being there sued must be treated as a citizen of that state, whatever its citizenship might be elsewhere.

This reasoning must apply as well to a suit *by* a corporation created by two states as to a suit against it. Being necessarily in each state a corporation under the laws of that state, it must be treated as such in a suit by it against a citizen of that state as well as in a suit against it by a citizen of another state.

If the railway company sued in that case had itself brought a suit against a citizen of Wisconsin in the Circuit Court for that state, alleging itself to be a citizen of Illinois, the Court must necessarily, upon the reasoning of this case, have said, "The plaintiff is a corporation, and as such a citizen of Wisconsin by the laws of that state. It is not *there* a corporation or citizen of any other state, and it can come into court there only as a citizen of that state, whatever its citizenship may be elsewhere."

In Muller *v.* Dows, a suit was brought by plaintiffs, one of whom was a citizen of Missouri, in the Federal Circuit Court of Iowa, against a railroad corporation formed by the consolidation of a corporation under the laws of Iowa, with another corporation of the same name under the laws of Missouri, pursuant to the general laws of each state.

This Court held that by the consolidation "the two companies became one," that the franchise of this company was indivisible," and therefore a decree of foreclosure and sale of the whole road in both states could be made in a suit in the Iowa circuit. And yet when objection was made in this court to the jurisdiction of the Circuit Court, upon the ground that the corporation was a citizen of Missouri, it was held, as in Railway Company *v.* Whitton, that the corporation was *in Iowa* a corporation under the laws of that state alone, and could be sued in the Circuit Court of Iowa only as a

citizen of that state, although it was also a corporation under the laws of Missouri, and a citizen of that state as well.

In Memphis & Charleston Railroad *v.* Alabama, a corporation of Tennessee was made a corporation under the laws of Alabama for the purpose of extending its road into that state, but with one and the same organization with the corporation in Tennessee. It was sued in the state court of Alabama by the state of Alabama to recover a tax for the use of one of its counties. This suit was removed into the Circuit Court of the United States for the Northern District of Alabama upon the petition of the corporation, alleging that it was a citizen of the state of Tennessee, and the plaintiff a citizen of Alabama. The Circuit Court, which had previously held in Copeland *v.* Memphis & Charleston Railroad, 3 Woods, 651, that this corporation was "as much a corporation of one state as of the other, and a citizen of both," remanded the cause to the state court upon the ground that the corporation was to be treated *in Alabama* as a corporation of that state only.

Upon error to this court it was held that the corporation, although a corporation in Tennessee, "must as to all its doings within the state of Alabama be considered a citizen of Alabama which *cannot sue* or be sued by another citizen of Alabama in the courts of the United States," and therefore the Circuit Court had no jurisdiction of the cause. It will be observed that the only question absolutely necessary to decide in this case was the same that had already been decided in Railway Company *v.* Whitton and Muller *v.* Dows; that is, that a corporation could not *be* sued in the Federal court of the state of Alabama as a citizen of any other state; but the language of the Court is somewhat broader, and covers the exact case at bar, holding that such a corporation cannot *sue* a citizen of the state in the Federal Circuit Court of that

state, and that decision necessarily follows from the reasoning of all three of the above cases.

If a corporation existing under the laws of two states, and as much a citizen of one as of the other, is to be treated when sued either in the state court or in the Federal court of the state as a citizen of that state only on the ground that it cannot there be a corporation of any other state, then it necessarily follows that when such a corporation brings a suit, either in the state courts or in the Federal court of one of the states, it must in like manner be treated as a corporation of that state only, because it cannot *there* be a corporation of any other state. It is impossible to say that such a corporation cannot be sued in one of the states as a corporation of another state, and at the same time to say that it can sue in the state as a citizen of another state.

Under these decisions, it is clear that the Boston & Lowell Railroad Corporation, a citizen of Massachusetts, could not sue the Nashua & Lowell Railroad Corporation in the Circuit Court of the District of Massachusetts *as a citizen of New Hampshire*; and that if the Nashua & Lowell Railroad Corporation should sue the Boston & Lowell Railroad Corporation in the state court of Massachusetts, the suit could not be removed to the Circuit Court upon the ground that the Nashua & Lowell Railroad Corporation is a citizen of New Hampshire.

How, then, can the Nashua & Lowell Railroad Corporation maintain this suit as a citizen of New Hampshire, in the Circuit Court for the District of Massachusetts? If it is to be taken as a citizen of Massachusetts alone, in any suit which is brought against it in the state of Massachusetts, or in the Circuit Court for the District of Massachusetts, is it not equally to be taken as a citizen of Massachusetts alone, in any suit which it brings in either of those courts?

II.

It cannot be assumed that the shareholders of the plaintiff are all citizens of New Hampshire.

It has long been settled law that the jurisdiction of the Federal courts in suits by or against corporations depends entirely upon the citizenship of the shareholders of the corporation, who, in case of corporations created solely by one state, are conclusively presumed to be all citizens of that state.

It was first held that a corporation, as such, was not a citizen within the meaning of the constitutional provision giving jurisdiction to the Federal courts of suits between citizens of different states; but that, as a private corporation is in fact but an association of individuals, united for a lawful purpose and permitted to use a common name, the court would treat the term "citizen," in the Constitution, as intended "to describe the real persons who come into court under the corporate name," and take jurisdiction in cases where the citizenship of the members of the corporation was such as to give it.

Bank of the United States *v.* Devaux, 5 Cranch, 61.

It was next held that, although the jurisdiction of the Federal courts in cases of corporations "exists only in virtue of the character of its members," the court would not look to the actual citizenship of the members, but would conclusively presume that the members were citizens of the state by which the corporation was created.

Louisville, etc., Railroad Co. *v.* Letson, 2 How. 497.

The result was that the Court, while holding that corporations were clearly not citizens within the meaning of the

Constitution, practically made them citizens within the meaning of the Constitution.

To say that a corporation is not a citizen, and therefore cannot sue or be sued as such, and then to say that it is to be conclusively presumed that its members are citizens of the state by which it is created, and therefore it can be sued or sue as a citizen of that state, although its members are not in fact citizens of that state, is in effect to say that it may sue or be sued as a citizen of that state. As an original proposition it would seem that as the jurisdiction of the Federal courts in such cases depends upon the citizenship of the members of the corporation, that membership should be established as a matter of fact by the party invoking the jurisdiction of the court, and not by an absolute legal presumption, without reference to the fact.

But it is not necessary to discuss that question in this case, for however proper it may be to absolutely presume that the members of a corporation created by one state are all citizens of that state, no such presumption can in the nature of things arise in the case of a corporation created by the concurrent legislation of two states, and having one franchise and one set of stockholders.

The fact that under the laws by which the plaintiff corporation was created its stockholders must be common stockholders in both states, necessarily prevents the presumption that they are citizens of one state only.

The Circuit Court could have jurisdiction of the cause of action in this suit only by reason of the citizenship of the parties; and, unless it is to be conclusively presumed that all the shareholders of the plaintiff are citizens of New Hampshire, the court had no jurisdiction.

How can it be conclusively presumed that the shareholders of a corporation existing under the legislation of two states,

and who are in fact indentical, are citizens of one state rather than of the other?

If it be said the shareholders of whose citizenship this presumption is established must be taken to be the shareholders of the original corporation in New Hampshire, the answer is that there are no such shareholders. The only shareholders are those in the united corporation whose rights are in respect to the railroad in Massachusetts as much as in New Hampshire. The shareholders in this company have a right to vote for directors to manage the entire road; they have a right to require these directors to operate the entire road within the limits of the corporate purpose; they have a right to dividends from the earnings of the entire road, and upon the winding up of the corporation they would have a right to share in the proceeds of the entire road and property in both states.

There are no shareholders in either state as distinct from shareholders in the other, and under the legislation creating the united corporation there cannot be. How, then, can it be assumed that all the shareholders of this corporation are citizens of one state and not of the other?

If it can, then the same corporation can sue in the Circuit Court of New Hampshire as a citizen of New Hampshire upon the ground that its shareholders are all citizens of Massachusetts, and also sue in the Circuit Court of Massachusetts upon the ground that its shareholders are all citizens of New Hampshire, or if sued in the courts of either state, may remove the suit to the Circuit Court upon the ground that it is a citizen of the other state.

If it be suggested that states cannot unite in creating a corporation, the answer is that there is no sound reason why two states cannot, by concurrent legislation, confer the same corporate power upon the same natural persons and

their successors, and thus create those persons one corporation in both states.

Such a corporation is, of course, subject, so far as it exercises its franchise within the jurisdiction of either state, to the law of that state, without regard to what may be the law of the other state, and subject to taxation by each state, not only upon its tangible property in that state, but also upon its stock and franchise, so far as the franchise is exercised therein, or its stock represented by property existing therein.

Railroad Company *v.* Vance, 96 U. S. 450, 458.

Either state can, of course, withdraw or modify the franchise which it has granted to these persons, so far as it has reserved the power to do so, and they may doubtless forfeit their franchise in either state by misuser or nonuser.

Atty-Gen. *v.* Petersburg R. R., 6 Iredell, 456.

But while the corporators hold their franchise *under the laws of all the states*, and act by virtue thereof as one corporation in all the states, how can they be permitted in a suit in either state to say that they are a corporation *under the laws of the other states only*, and therefore to be assumed not to be citizens of the state in which the suit is brought?

In Philadelphia, etc., Railroad Company *v.* Maryland, 10 How. 376, 392, decided in 1850, Chief Justice Taney, in delivering the opinion of the Court, said: "The plaintiff in error is a corporation composed of several railroad companies which had been previously chartered by the states of Maryland, Delaware and Pennsylvania, and which, by corresponding laws of the respective states, *were united together and form one corporation* under the name and style of the Philadelphia, Wilmington and Baltimore Railroad Company.

The road of this company extends from Philadelphia to Baltimore."

In Railroad Company *v.* Harris, 12 Wall. 65, 82, decided in 1870, Mr. Justice Swayne, in delivering the opinion of the Court, said: "We see no reason why several states cannot by competent legislation unite in creating the same corporation, or in combining several existing corporations into a single one. . . . The jurisdictional effect of the existence of such a corporation as regards the Federal courts is the same as that of a copartnership of individual citizens residing in different states."

In Wilmer *v.* Atlanta, etc., R. R., 2 Woods, 447, Woods, Circuit Judge, appointed a receiver of a corporation created by concurrent legislation of two states, upon the ground that it was one corporation in both states, and subsequently ordered a sale of the entire road, saying, upon the authority of Railroad Company *v.* Harris, that two states might by concurrent legislation create the same corporate body, and that the defendant was "one and the same corporate body in both states."

See, also, Burger *v.* Grand Rapids, etc., R. R. Co., 22 Fed. Rep. 561.

In Copeland *v.* Memphis & Charleston Railroad, 3 Woods, 651, Woods, Circuit Judge, in discussing the question whether a corporation created by the common legislation of two states is a corporation in both states, or is to be considered as a distinct corporation in each state, held that "in such a case it is as much a corporation of one state as of the other, and is a citizen of both . . . and there is no legal or constitutional necessity for treating it as two corporations in any suits or proceedings by or against it."

In Bishop *v.* Barnard, 28 Conn. 289, 299, it was distinctly held that it was competent for the states of Rhode Island

and Connecticut by united action to create under their joint authority a corporation composed of two corporations, one existing in each state, the Court saying that it could not be questioned, in view of the authorities, that a state may create a corporation which shall be composed of two or more corporations created by the same state, as well as of two or more natural persons, or that the state may create a corporation composed of natural persons belonging to different states; and there is no more objection to a state creating a corporation composed of corporations chartered by different states, than there is to its creating one of natural persons belonging to those states; and that there was no objection, technical or otherwise, to the parting by two or more states unitedly, in the exercise of their sovereign authority, with such of their respective powers as shall be necessary in order to confer upon persons, natural or artificial, the franchise or privilege of being a corporation.

See, also,

Railroad Co. *v.* Georgia, 98 U. S. 359;
St. Louis, etc., R'w'y Co. *v.* Berry, 113 U. S. 465;
Pullman Car Co. *v.* Missouri Pacific Co. 115 U. S. 587;

which all assume the power of two or more states to create one corporation.

J. H. BENTON, JR.

APPENDIX.

The following are,

First. The citizenship clause of the original bill, filed April 17, 1880.

Second. The amendment to the original bill, filed May 31, 1880.

Third. The defendant's plea to the jurisdiction and the amended bill.

Fourth. The oral opinion of the Circuit Court, Aug. 27, 1881, overruling the defendant's plea.

Fifth. The demurrer to the present amended bill.

Sixth. The statutes of Massachusetts and New Hampshire constituting the Nashua & Lowell Railroad Corporation.

These papers, with the exception of the opinion, are all contained in the original transcript of record, but were omitted in printing by stipulation of counsel, and the opinion overruling the demurrer is found on page 404 of the printed record.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

NASHUA AND LOWELL RAILROAD CORPORATION

v.

BOSTON AND LOWELL RAILROAD CORPORATION ET AL.

BILL OF COMPLAINT.

[FILED APRIL 17, 1880.]

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

Your orator, the Nashua and Lowell Railroad Corporation, a corporation duly established and existing by the laws of the State of New Hampshire, and a citizen of said State of

New Hampshire, brings this its bill of complaint against the Boston and Lowell Railroad Corporation, a corporation duly established by the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, and against Hocum Hosford and Charles E. A. Bartlett, of the city of Lowell, also citizens of said State of Massachusetts.

And thereupon your orator complains and says, that said Nashua and Lowell Railroad Corporation is, and for many years has been, a corporation under the laws of the State of New Hampshire, owning a railroad extending from Nashua, in New Hampshire, to Lowell, Mass.; and said Boston and Lowell Railroad Corporation is, and for many years has been, a corporation under the laws of said State of Massachusetts, owning a railroad extending from said Lowell to the city of Boston, Mass.

AMENDMENT OF BILL.

[FILED MAY 31, 1880.]

And now comes the complainant in said suit before the June Rule Day, at which the subpœna is returnable, and amends its said bill of complaint by inserting in the first sentence thereof after the words "a citizen of said State of New Hampshire," the words following, to wit: "and Jeremiah W. White, Cornelius V. Dearborn and Evans B. Hammond, all of the city of Nashua and citizens of said State of New Hampshire, who are respectively holders of shares of the capital stock of said Nashua and Lowell Railroad Corporation, bring this their bill of complaint."

And the complainant further amends said bill of complaint by using the word "orators" in said bill wherever the word "orator" now occurs, and by substituting the verb plural after the word "orators" where the verb singular is now used.

By F. A. BROOKS,
Solicitor.

DEFENDANT'S PLEA TO AMENDED BILL.

[Filed July 19, 1880.]

The joint and several plea of the Boston & Lowell Railroad Corporation, Hocum Horsford and Charles E. A. Bartlett, defendants to the amended bill of complaint of the Nashua & Lowell Railroad Corporation, Jeremiah W. White, Cornelius V. Dearborn and Erastus B. Hammond.

These defendants, by protestation, not confessing or acknowledging the matters and things in and by said amended bill set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said amended bill, say that this Court ought not to take further cognizance of or sustain the said bill of complaint, because they say that they, the said defendants, at the time of filing said bill, were and still are all, each and every one citizens of the State of Massachusetts, and that said plaintiffs, at the time of filing said bill, were not and still are not all, each and every one citizens of another State, but that the said Nashua & Lowell Railroad Corporation, one of said plaintiffs, at the time of filing said bill, was and still is a corporation duly established and existing under and by virtue of the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, and, at the time of filing said bill, was not and still is not a corporation established and existing by the laws of the State of New Hampshire, and a citizen of said State of New Hampshire. All of which matters and things these defendants do aver to be true and are ready to verify. Wherefore they plead the same to the whole of said amended bill, and pray the judgment of this honorable Court whether they should be compelled to make any other or further answer to said bill. And the said defendants further pray

to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

THE BOSTON & LOWELL
RAILROAD CORPORATION.
By J. G. ABBOTT, *its President.*

HOCUM HORSFORD,
By S. A. B. ABBOTT, *his Attorney.*

C. E. A. BARTLETT.

I certify that the above plea is well founded in point of law.

S. A. B. ABBOTT,
Of Counsel for Defendants.

COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.

BOSTON, July 16, 1880.

Then personally appear the above named Josiah G. Abbott, President of the Boston & Lowell Railroad Company, and Charles E. A. Bartlett, and severally make oath that the said plea is not interposed for delay, and is true in point of fact.

Witness my hand and notarial seal, the day and year last above written.

[SEAL] GEORGE A. SAWYER,
Notary Public.

ORAL OPINION OF CIRCUIT COURT.

Printed in 8 *Federal Reporter*, 458.

(AUGUST 27, 1881.)

This bill in equity was brought by the Nashua and Lowell Railroad Corporation, which is alleged to be a citizen of New Hampshire, and other citizens of that State, against

the Boston and Lowell Railroad Corporation and others, citizens of Massachusetts. It appears that the plaintiff corporation is a joint or consolidated corporation, operating a continuous line of railroad, which lies partly in Massachusetts and partly in New Hampshire, and is formed by the union of two distinct corporations, each having the same name, chartered under the laws of the two States. The defendants filed a plea to the jurisdiction. It was denied that the court had jurisdiction, for the reason that the suit does not involve a controversy between citizens of different States. The question was argued some time since.

F. A. Brooks, *for Plaintiff.*

J. G. Abbott *and* S. A. B. Abbott, *for Defendant.*

Nelson, D. J. (orally). This case was argued at the last October term of this court, upon the plea of the defendant to the jurisdiction of the court and an agreement of the facts.

Judge Lowell, C. J., then took the papers for the purpose of decision, but soon afterwards was in some way led to suppose that the case had been adjusted between the parties, and so gave it no further consideration. Shortly before he went abroad he was informed that the case had not been adjusted, and he left it with me for determination, so that the decision now to be announced has been reached by myself alone.

The Nashua and Lowell Railroad Company was separately chartered under the laws of New Hampshire and Massachusetts, and the two corporations so created were afterwards consolidated by law in both States. It has been settled by the Supreme Court of the United States that corporations created by different States and afterwards consolidated, do not become a single corporation for all purposes; but while

they may for some purposes be treated as a single corporation, yet for other purposes they remain separate and distinct corporations.

In this case it seems that the defendant corporation might go into New Hampshire and there sue the plaintiff, as a New Hampshire corporation, in the federal court, although it could not bring such suit in the district of Massachusetts against the New Hampshire corporation, because no service upon the New Hampshire corporation as such could be got in this district, if for no other reason. It has been determined by Judge Lowell that in some cases non-resident corporations may be served with process from United States courts in other districts than those in which they were chartered, and where they are found to be doing business, or domiciled. But this rule would not, we suppose, extend to a case like the present.

If the defendant could sue the plaintiff in the federal court for New Hampshire, notwithstanding the fact of the plaintiff being chartered under the laws of both States, there would seem to be no good reason why the plaintiff, claiming under its New Hampshire charter, should not be allowed to sue the defendant in the federal court for Massachusetts, as it would be impossible for the defendant in such case to deny the title of the plaintiff as predicated upon the New Hampshire charter, or to deprive the plaintiff of the benefit of its New Hampshire citizenship thus acquired.

I am aware that a different conclusion seems to have been reached in a case * decided in the eastern district of Pennsylvania, but am not able to concur in the views taken in that case. The defendant's plea to the jurisdiction is therefore overruled.

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* The case here referred to is *Johnson* v. *Phil., Wil. & B. R. R.*, and is briefly reported in 1 Am. Law Rev. 457.

DEMURRER OF THE BOSTON & LOWELL RAILROAD CORPORATION TO THE PRESENT AMENDED BILL OF COMPLAINT.

[Filed Nov. 9, 1883.]

The Boston & Lowell Railroad Corporation, one of the defendants named in the complainant's bill of complaint, not confessing any or all of the matters and things in the said bill of complaint as amended to be true in the manner and form therein set forth and alleged, doth demur to said bill as amended, and for cause of demurrer showeth: —

First. The plaintiff has not in its said bill of complaint made or stated any case that entitles it to the discovery or relief prayed for, or to any discovery or relief from this defendant as to the matters contained in said bill or any of such matters.

Second. It appears by said bill that the complainant has a full, complete and adequate remedy at law for all the claims, matters and things therein set forth.

Third. It appears by said bill that it is exhibited against this defendant and against the other defendants therein named, for distinct matters and causes, in several of which this defendant is in no wise interested or concerned either severally or jointly with the other defendants or either of them, and that said matters and causes are in no wise dependent upon each other, and that the bill is altogether multifarious.

Fourth. It appears by said bill that the defendants, Charles E. A. Bartlett and Hocum Hosford, are not, either together or separately, liable, interested or concerned with this defendant in any cause of action, matter or thing charged against this defendant; and that they are wrongfully and improperly joined and made parties defendant with this defendant.

Fifth. In said bill, the complainants pray that certain interrogatories shall be answered and certain discoveries made personally by Josiah G. Abbott, who is alleged to be president of this defendant corporation, although said Abbott is not made a party to the bill; and certain discoveries are asked for from said Abbott and this defendant by the complainant, who at the same time expressly waives the oath to the answers in which the discoveries asked for are to be made.

Sixth. It does not appear in said bill that the complainant has any separate interest or any interest in the contract or agreement set forth in the bill under and by virtue of which alone it is sought to charge this defendant in this cause, and to enforce which alone this bill is exhibited.

Seventh. It appears in said bill that, if the plaintiff has any interest in the agreement or contract set forth in the bill, it has such interest jointly with the Nashua & Lowell Railroad Corporation, a corporation chartered by the laws of the Commonwealth of Massachusetts, and a citizen of said Commonwealth; that said last-named corporation is a necessary party plaintiff in this bill; that said last-named corporation is not joined in this bill, and that discovery and relief prayed for in the bill cannot be decreed, if at all, until said last-named corporation is joined with the complainant.

Eighth. The interrogating part of the bill is not drawn in accordance with rules of this court, and is wholly informal.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to said bill of complaint, and prays to be hence dismissed with its costs and charges in this behalf sustained.

S. A. B. ABBOTT.

Of Counsel for Defendant Corporation.

I certify that the above demurrer is well founded in point of law.

S. A. B. ABBOTT,
Of Counsel.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.

BOSTON, Nov. 8, 1883.

Then personally appeared Josiah G. Abbott, and made oath that he is president of the Boston & Lowell Railroad Corporation, and that the above demurrer is not interposed for delay, before me.

Witness my hand and notarial seal, the day and year last above written.

[SEAL]

GEO. A. SAWYER,
Notary Public.

The legislation in New Hampshire and Massachusetts constituting the Nashua & Lowell Corporation is as follows: —

FIRST: CHAPTER 37, NEW HAMPSHIRE LAWS, 1835.

AN ACT TO INCORPORATE THE NASHUA AND LOWELL RAILROAD CORPORATION.

Be it enacted, etc.:

SECTION 1. That Jesse Bowers, Ira Gay, Daniel Abbot, Benjamin F. French, John M. Hunt, Peter Clark and Charles J. Fox, their associates, successors and assigns, be and hereby are constituted and made a corporation by the name of the Nashua and Lowell Railroad Corporation; and by that name may sue and be sued, prosecute and defend to final judgment and execution, and may have and use a common seal, and the same may alter and renew at pleasure; and may also make, ordain and put in execution all such by-laws and regulations (not being contrary to the constitution and laws of this State) as shall be necessary, proper and convenient for the government of said corporation, the due management of its concerns and the preservation and proper use of said railroad; and shall be and hereby are vested